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Supreme Court of the United States

OCTOBER TERM, 1959

No. 475

MANUFACTURERS RECORD PUBLISHING COMPANY

Petitioner

versus

MARGARET E. LAUER, the duly qualified and authorized Testamentary Executrix of the Succession of Jacques E. Blevins, LOUIS J. ROUSSEL and REPUBLIC PETROLEUM CORPORATION

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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(4) This court has never decided the important question of Federal-State relations of whether or not 28 U.S.C. § 2283, prevents a federal court from enjoining a litigant from taking advantage of a void, unconscionable and inequitable state court decision after all proceedings in the state court are completed, although prior to the 1948 amendment this Court held that such injunctions would lie under Section 265 of the Judicial Code.... 11 - 13

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Supreme Court of the United States

OCTOBER TERM, 1959

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MANUFACTURERS RECORD PUBLISHING COMPANY

Petitioner

versus

MARGARET E. LAUER, the duly qualified and authorized Testamentary Executrix of the Succession of Jacques E. Blevins, LOUIS J. ROUSSEL and REPUBLIC PETROLEUM CORPORATION

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Manufacturers Record Publishing Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on June 29, 1959. Rehearing was denied on July 28, 1959.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 64), printed in Appendix B hereto, *infra*, p. 14 is reported in 169 F. Supp. 234. The opinion of the Court of Appeals (R. 92)

is reported in 268 F.2d 187 and is printed in Appendix B hereto, *infra*, p. 2. The opinion of the Louisiana Supreme Court printed in Appendix B hereto, *infra*, p. 28, is reported in 235 La. 708, 105 So.2d 392. The opinion of the 29th Judicial District Court of the State of Louisiana is not reported but is printed in Appendix B hereto, *infra*, p. 100.

JURISDICTION

The judgment of the Court of Appeals was entered June 29, 1959, (R. 92). Rehearing was denied on July 28, 1959, (R. 166A). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. May a federal district court, exercising diversity of citizenship jurisdiction, entertain an action of nullity to declare the absolute nullity of a judgment rendered by a state court of last resort where the law of the state allows such an action to be brought in any court at any time?

2. Is a non-resident defendant denied equal protection of the laws by a state court of last resort which arbitrarily neglects and refuses to accord procedural and substantive safeguards made mandatory by the state law and recognized by the state court's opinion on final hearing as mandatory rights and safeguards to which all litigants in the courts of the state are entitled?

3. Does a state appellate court deny due process of law to a litigant by reversing a trial court judgment in his favor on the strength of evidence excluded by the trial court?

4. Where a state court of last resort denies due process of law and equal protection of the law to a litigant and such fact first becomes apparent in its decision on rehearing from which the law of the state forbids the complainant from further pleading in that state appellate court and raising the Constitutional questions for review by this Court, after the state court judgment is final and all state proceedings are completed does 28 U.S.C. §2283 deprive a federal district court from (a) exercising jurisdiction acquired under 28 U.S.C. §§ 1331, 1332, (b) taking cognizance of the denial of constitutional rights which appear on the face of the state court record and, (c) enjoining the successful party from taking advantage of this unconscionable state court judgment?

STATUTES INVOLVED

The statutory provisions involved are United States Constitution, Amendment 14, United States Code, 28:2201, 28:2283, 28:1651, and Article 44 of the Louisiana Code of Practice. They are printed in Appendix A, *infra*, p. 1.

STATEMENT OF THE CASE

An action to try title to real property, known in Louisiana as a Petitory Action or Action in Revendica-

tion, was instituted against petitioner in a Louisiana state court in April, 1953. The instrument upon which the plaintiff, respondent here, in the trial court asserted title was excluded from evidence. (State Court Transcript, pp. 556, 1715; opinion of the 29th Judicial District Court of the State of Louisiana, Appendix p. 100 at p. 106, R. p. 22). On March 6, 1957, the state trial court rejected the respondent's claim of title and held that petitioner did have title by deed as well as by long continued and uninterrupted possession. (Original Exhibit M-19, reproduced in part at pages 20-23 of the Record; opinion of the 29th Judicial District Court of the State of Louisiana, Appendix p. 100 at p. 105.)

On appeal the Louisiana Supreme Court reversed the trial court. (Appendix p. 28). The Louisiana Supreme Court arbitrarily examined the possessor's, petitioner's, title without requiring respondent, who was out of possession and claiming title, to prove his title. Article 44 of the Louisiana Code of Practice mandatorily requires the party out of possession to first prove his title before the possessor's title can be examined, but the Louisiana Supreme Court did not even mention said Article 44, let alone accord petitioner its vested rights thereunder.

On rehearing the Louisiana Supreme Court, in affirming its decision with respect to the land here in controversy, for the first time mentioned Article 44 of the Louisiana Code of Practice and affirmatively stated that said article required respondent to prove his title

in order to recover petitioner's property. (Appendix p. 69). After affirmatively recognizing the mandatory provision of said Article 44 as controlling the case, the state court violated the mandatory law and commenced immediately to first examine petitioner's, the possessor's, title. The Louisiana Court did not give any reasons for its action, and never required respondent to prove his title.

Three dissenting justices of the Louisiana Supreme Court took cognizance that the mandatory substantive and procedural law of the State of Louisiana had been violated and denied petitioner by the majority of the court. (Dissenting Opinions, Appendix pp. 52-65; 86-90). In reversing the judgment of the trial court, the Louisiana Supreme Court arbitrarily refused to accord petitioner its rights under the mandatory laws of the State of Louisiana, which required the plaintiff in a petitory action to make out his title while, for the first time, in its opinion on rehearing it correctly stated the mandatory law which controlled Louisiana petitory actions (Appendix p. 69) and which had heretofore been accorded all litigants similarly situated but denied to petitioner.

Petitioner had no right to apply for a second rehearing in view of Section 3 of Rule 12 of the Louisiana Supreme Court Rules (Appendix p. 1-a). Nor could it file any further pleadings in the state court to raise the federal questions herein presented and establish a basis for review by this Court as required by 28 U.S.C. § 1257.

In reversing the decision of the trial court the Louisiana Supreme Court relied on the evidence which

had been excluded in the trial court without first passing upon its admissibility or giving petitioner the right to refute same.

The effect of the state court decision was to take the property of petitioner and give it to respondents without requiring respondents to show their legal title thereto.

Margaret E. Lauer, respondent, is the testamentary executrix of the Succession of Jacques E. Blevins,who instituted the state court proceedings. Louis B. Roussel and Republic Petroleum Corporation were parties to the state court proceedings and hold mineral leases on the property and are operating oil wells thereon, drilled by petitioner's mineral lessee.

On October 15, 1958, after all proceedings had been completed in the state court, (May 26, 1958) petitioner filed a complaint (R. 2) in the Federal District Court for the Eastern District of Louisiana, asserting that its Constitutional rights of equal protection of the law and due process of law had been violated by the Louisiana Supreme Court, praying that the state court judgment be declared null and void and that respondents be enjoined from taking advantage of their void, inequitable and unconscionable judgment. The District Court dismissed the complaint on the ground that no federal question was presented, that the federal court, exercising diversity of citizenship jurisdiction, could not entertain an action to declare the state court judgment a nullity, and

that 28 U.S.C. § 2283 prohibited the federal court from issuing an injunction. (R. 64 - 76, Appendix p. 14). A motion for rehearing was denied. (R. 77 - 79, Appendix p. 27).

The court below affirmed the judgment of the District Court on June 29, 1959, (R. 92 - 101, Appendix p. 2), and denied rehearing on July 28, 1959. (R. 108-166A, Appendix p. 13).

REASONS FOR GRANTING THE WRIT

This case involves a large tract of oil producing property valued at many millions of dollars and raises constitutional questions, and questions of federal-state relationships, some of which have never been directly passed upon by this Court. These questions relate to the power of federal courts of original jurisdiction to declare the nullity of a judgment of a state appellate court of last resort on constitutional grounds, and the jurisdiction of federal courts to enjoin the parties from taking advantage of such a judgment after all proceedings in the state court have terminated. Stability of land titles and constitutional guarantees against state confiscation of private property whether by statute or court decree are of prime importance and concern to the oil and gas industry which must of necessity invest vast sums of money in the development of the nation's natural resources.

(1.) The decisions of the courts below, holding that a federal district court exercising diversity of citizenship jurisdiction cannot declare the absolute nullity of this

state court judgment, when the law of Louisiana permits any court to entertain such an action, are directly in conflict with the decisions of the Fifth Circuit Court of Appeals in *O'Boyle v. Bevil*, 259 F.2d 506, cert. den., 3 L.ed.2d 576 (1959), the Eighth Circuit Court of Appeals in *City of Memphis, Tennessee v. Ingram*, 195 F.2d 338 (1952) and the opinion of this Court in *Gaines v. Fuentes*, 92 U.S. 10 (1875). In the *Gaines* case this Court directed a federal court to accept diversity jurisdiction of an action to annul and restrain enforcement of a Louisiana state court decree, stating:

> "There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity. But they are none the less essentially such suits; and if by the law obtaining in the State, customary or statutory, they can be maintained in a State Court, whatever designation that court may bear, we think they may be maintained by original process in a Federal Court, where the parties are, on the one side, citizens of Louisiana, and on the other citizens of other States." (92 U.S. 20-21).

A judgment rendered in violation of the mandatory laws of Louisiana is an absolute nullity. *State v. Kifer*, 186 La. 674, 173 So. 169 (1937), *Bercegeay v. Techeland Oil Corporation*, 209 La. 33, 24 So.2d 242 (1945) (violation of mandatory provisions of Article 165, Louisiana Code of Practice). *Rocques' Heirs v. Levecque's Heirs*, 110 La. 306, 34 So. 454 (1903) (violation of mandatory Louisiana tutorship laws). A judgment alleged to be absolutely null may be attacked in any court of original jurisdiction. *Decuir v. Decuir*, 105 La. 481, 29 So. 932 (1901),

Edwards v. Whited, 29 La. Ann. 647 (1877), *Abraham Land and Mineral Co. v. Marble Sav. Bank*, 35 F.Supp. 500 (W. D. La. 1940), *Nottingham v. Hoss*, 141 So. 391 (La. App. 1932); see *Barrow v. Hunton*, 99 U.S. 80 (1878). *State v. Stansberry*, 228 La. 655, 83 So.2d 890 (1955) (appeal not necessary to reverse, set aside or vacate a final Louisiana court judgment which is absolutely null).*

(2.) This Court has never ruled whether a state court of last resort denies equal protection of the law to a non-resident litigant in reversing a judgment in his favor, by arbitrarily neglecting and refusing to accord mandatory procedural and substantive safeguards for the protection of the property of the non-resident and recognized by the state court's opinion on final hearing as rights and safeguards to which all litigants in the courts of the state are entitled.

"The right of acquiring and possessing property and having it protected is one of the natural inherent and unalienable rights of man." *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304, 310 (1795). Due process of law "inhibits the taking of one man's property and giving it to another contrary to settled usages and modes of procedure." *Ochoa v. Hernandez Y. Morales*, 230 U.S. 139, 161 (1912). Even though a state court may give a party the fullest opportunity to be heard, yet its final action may violate the 14th Amendent. *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1896).

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* *Dulien Steel Products v. Connell*, 252 F. 2d 556 (5th Cir. 1958), which the courts below erroneously relied upon, involved a mistake of fact or relative nullity, not violation of mandatory law or *absolute* nullity as is present here.

This Court has held that action of state officers in violation of mandatory state laws regarding procedure for the protection of property renders the actions of the officials void. *French v. Edwards*, 80 U.S. (13 Wall.) 506(1871). See *Griffin v. Griffin*, 327 U.S. 220 (1945) (judgment obtained in violation of procedural due process not entitled to full faith and credit).

The action of the Louisiana Supreme Court, in adjudicating petitioner's property to another in violation of mandatory substantive and procedural laws, is likewise a denial of equal protection guaranteed by the 14th Amendment.

(3.) This Court, speaking through Justice Holmes, held that where the Louisiana Supreme Court reversed a judgment of a trial court on the strength of evidence excluded by the trial court, the litigant was denied his rights of due process of law contrary to the 14th Amendment:

> "because the case has been decided against him without his ever having had the proper opportunity to present his evidence." *Saunders v. Shaw*, 244 U.S. 317, 319 (1916).

The sole instrument upon which the Louisiana Supreme Court adjudicated petitioner's property to respondents was excluded from evidence in the trial court, and the Louisiana Supreme Court did not pass upon its admissibility or accord petitioner the right of trial de novo to present evidence in opposition.

In recent years many cases have arisen invoking alleged conflicts of state judicial action with provisions of the United States Constitution, particularly those dealing with due process and the equal protection of the law. This Court, as well as the Supreme Court of Louisiana, has held that state judicial action which conflicts with constitutional guarantees is absolutely null and void and of no effect.* However, the United States District Court for the Eastern District of Louisiana and the Court of Appeals for the Fifth Circuit have ruled in the present case that a federal court of original jurisdiction can neither declare the nullity of a state court's judgment which violates the guarantees of the federal constitution nor enjoin its execution. These courts have cited dicta, and decisions of this Court involving differing sets of facts, and circumstances where the state proceedings were *not* completed. Decisions of this Court which are in point support complainant's position for a declaratory judgment and injunction.

(4.) After all proceedings in a state court are completed, whether 28 U.S.C. § 2283 deprives a federal court of jurisdiction acquired under 28 U.S.C. §§ 1331, 1332 and prevents that court from enjoining a prevailing party in a state court from taking advantage of his void, unconscionable and inequitable judgment is an important and difficult question of federal-state relations which has never been decided by this Court.

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* *Brown v. Board of Ed. of Topeka*, 349 U.S. 294, 298 (1954).
Cooper v. Aaron, 3 L.ed. 2d 1, 3 (1958).
Griffin v. Griffin, 327 U.S. 220, 228-229 (1945).

Under Section 265 of the Judicial Code, the law prior to the 1948 enactment of 28 U.S.C. §2283, this Court held that a federal district court could enjoin the execution of a state court judgment after all proceedings were completed in the state court. *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920), *Simon v. Southern R. Co.*, 236 U.S. 115 (1914), *Marshall v. Holmes*, 141 U.S. 589 (1891).

These cases have never been reversed but the courts below rejected their authority because of the dicta of this Court in *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941), *Hill v. Martin*, 296 U.S. 393 (1935), and *Amalgamated C. W. of A. v. Richman Bros.*, 348 U. S. 511 (1954). In all of these cases injunctions were sought to interfere with proceedings in progress in the state court. 7 Moore's Federal Practice, Cum. Supp. page 13 (1958). They have no application to the case at bar where all proceedings in the state court are completed. The *Toucey* decision *supra*, has been rejected by legislation, "Historical and Revision Notes" following 28 U.S.C. § 2283, 7 Moore's Federal Practice, page 648 (1955), as well as by judicial interpretation. *Greyhound Corp. v. Leadman*, 112 F. Supp. 237 (Ky. 1953), *Ostroff v. Johnson*, 78 F. Supp. 718 (N. J. 1948), *Cf. American National Bank & T. Co. of Chicago v. Taussig*, 255 F. 2d 765 (7th Cir. 1958).

Chief Justice Warren and Justices Black and Douglas expressly recognize that the enactment of 28 U.S.C. § 2283 overruled this Court's decision in *Toucey v. New York Life Ins. Co., supra*, and its "judicial inflexibility". These honorable justices stated:

> "However imprecise may be the language of § 2283, its legislative history makes it abundantly clear that the provision was not intended to repeal pre-existing exceptions to § 265." *Amalgamated C. W. of A. v. Richman Bros.*, 348 U.S. 511, 523 (1954) (dissenting opinion).

The "pre-existing exceptions to § 265" which these justices referred to are found in the cases relied upon by petitioner, *Wells Fargo & Co. v. Taylor*, *Simon v. Southern R. Co.*, and *Marshall v. Holmes*, *supra*, where all proceedings in the state courts were completed.

Both the Fifth Circuit Court of Appeals, in *Jacksonville Blow Pipe Co. v. Reconstruction Fin. Corp.*, 244 F. 2d 394 (1957) and this Court in *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957) have recognized the ambiguity of 28 U.S.C. § 2283 and the need for positive interpretation by this Court.

The holdings of the courts below, that 28 U.S.C. § 2283 deprived the Federal District Court of its acquired jurisdiction, are in direct conflict with the decisions of this Court under former § 265 which held that the statute did not deprive a district court of jurisdiction but merely went to the question of equity after trial on the facts. *Smith v. Apple*, 264 U.S. 274 (1923), *Sovereign Camp, Woodmen of the World v. O'Neill*, 266 U.S. 292 (1924); see "Moore's Commentary on the U. S. Judicial Code", p. 407 (1949).

In the very recent case of *County of Allegheny v. Frank Mashuda Co.*, (Case No. 347), 3 L. ed. 2d 1163, 1165 (June 8, 1959) this Court was called upon to decide whether or not a federal district court may abstain from

exercising diversity jurisdiction, which the district court recognized as being properly invoked, in an action seeking to restrain a litigant from "proceeding further in the pending state court damage proceeding." As in the case at bar, the action could have been brought in the state court. The defendant argued that the case would be barred by 28 U.S.C. § 2283. This Court held:

> "We hold that in such circumstances a District Court cannot refuse to discharge the responsibility, imposed by Congress under 28 USC § 1332 and 1441, to render prompt justice in cases where its diversity jurisdiction has been properly invoked."

This Court has never considered whether 28 U.S.C. §2283 takes away jurisdiction once acquired under 28 U.S.C. §§ 1331, 1332, or whether it deprives a federal court from issuing an injunction directed against litigants, where all proceedings in the state court are completed and the state court judgment final.

Should an injunction be considered inappropriate here, nevertheless, as this Court held in *County of Allegheny v. Frank Mashuda Co., supra*, the federal court may still accept jurisdiction to declare the absolute nullity of the state court judgment.

Other cases are sure to arise where a state court of last resort, on final hearing, deprives a litigant of his constitutional rights and where after all proceedings are

completed in the state court the litigant seeks relief in the federal district court. It is imperative that this Court rule whether or not the federal court may, in such circumstances, grant relief.

CONCLUSION

Petitioner invoked the jurisdiction of the federal courts *after all proceedings were completed* in the state court to have a state court judgment declared an absolute nullity and to have respondents enjoined from executing said judgment. The law of Louisiana allows the action of absolute nullity to be brought in any court of original jurisdiction. The decisions of this Court allow injunctions to issue in such a case when all proceedings in the state court are complete. The courts below have failed to take cognizance of the Louisiana jurisprudence and the applicable decisions of this Court. This Court has not directly ruled upon the point in controversy since the 1948 amendment to 28 U.SC. § 2283, and in this field of federal-state relations it is a matter of national importance that the law be set at rest.

Copies of petitioner's briefs in the Court of Appeals have been filed in this Court. These briefs will amplify the reasons for certiorari set forth hereinabove.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 12, 1959

U. S. Const. amend. XIV, § 1

" • • • nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 1651(a) (1949)

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 2201 (1949)

"In a case of actual controversy within its jurisdiction, except with respects to Federal taxes, any court of the United States, upon the filing of an appropriate pleading may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. § 2283 (1948)

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effecuate its judgments."

Art. 44, Louisiana Code of Practice of 1870

"The plaintiff in an action or revendication must make out his title, otherwise the possessor, whoever he be, shall be discharged from the demand."

Louisiana Supreme Court Rules, Rule 12 (§ 3)

"When a case has been decided on rehearing, another petition for a rehearing will not be considered unless the applicant has not theretofore applied for and been granted a rehearing or unless the court, in deciding the case on rehearing, has expressly reserved to the unsuccessful party or parties the right to apply for another rehearing."

APPENDIX "B"

OPINIONS OF THE COURTS BELOW

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17735

MANUFACTURERS RECORD PUBLISHING COMPANY,

Appellant,

versus

MARGARET E. LAUER, the duly qualified & authorized Testamentary Executrix of the Succession of Jacques E. Blevins, etc., et al.,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

(June 29, 1959.)

Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

HUTCHESON, Chief Judge: This is an appeal from a judgment dismissing, for the reasons stated in the opinion of the district judge,(1) plaintiff's suit to enjoin as a nullity the execution and enforcement of the judgment of the Supreme Court of Louisiana in the case of *Jacques E. Blevins v. Manufacturers Record Publishing Co., et al*, 105 So.(2) 392, and, in the alternative, for a declaratory judgment.

(1) Manufacturers Record Publishing Co. vs. Lauer, 169 Fed. Supp. 234.

While the nature of the litigation and the questions it posed below and poses here are fully disclosed in the thorough and careful opinion of the district judge, we think it desirable, in order to more precisely point up plaintiff-appellant's position on this appeal, to reproduce in substance in the margin the "Statement of the Case" as appellant's brief sets it out.(2)

(2) Appellant, Manufacturers Record Publishing Company, filed this complaint seeking to have the judgment of a state court of Louisiana, in the case of Jacques E. Blevins v. Manufacturers Record Publishing Company et al adjudged null and void and that the defendant- appellees in this action, Margaret E. Lauer, Testamentary Executrix of the Succession of Jacques E. Blevins, Louis J. Roussel and Republic Petroleum Corporation (herein designated as Blevins") be enjoined from executing said judgment on the ground that said judgment is a nullity; and in the alternative, for a Declaratory Judgment.

In April of 1953, Blevins instituted an action, to try title to real estate against Manufacturers in the District Court of St. Charles Parish, Louisiana. This form of action is known in Louisiana as a Petitory Action or an action of Revendication, as provided by Articles 43 and 44 of the Louisiana Code of Practice.

In this action, Blevins claimed ownership of 408.91 acres of oil producing property acquired by Manufacturers under a deed dated July 23, 1915, which deed included a total of 442 acres in Sections 39 and 40, Township 14 South, Range 20 East, originally purchased by one Albert Phenis from Allen T. Dusenbury on March 9, 1910. Blevins, in his petition, divided said 408.91 acre tract into three tracts, labeled Tracts 1, 2 and 3. Manufacturers had been in undisturbed possession of the 408.91 acres (or Tracts 1, 2 and 3) since the year 1916.

On March 6, 1957, the District Court of St. Charles Parish, Louisiana rendered judgment holding that Blevins had no title to the disputed 408.91 acres, and decreed that Manufacturers did have title by deed, as well as by long continued and uninterrupted possession.

Thereafter, Blevins appealed to the Louisiana Supreme Court, which on Nov. 12, 1957, reversed the judgment of the District Court. A rehearing was granted and on May 26, 1958, the court affirmed its original decision with respect to Tracts 1 and 3, but recognized Manufacturers

Upon the basis of this statement appellant, declaring:

"In this proceeding, Manufacturers is not attacking the judgment of the Louisiana Supreme Court on the ground that the court erroneously interpreted or misapplied the Louisiana law, as mis-stated by the United States District Court below, but appellant, Manufacturers attacks the judgment of the Louisiana Supreme Court on the ground that said judgment was and is an ABSO-

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as the owner of Tract 2. From both decisions three of the justices of the Louisiana Supreme Court dissented.

In reversing the judgment of the trial court, the Louisiana Supreme Court did not follow the mandatory law of Article 44 of the Louisiana Code of Practice which required Blevins to first prove a title, but commenced immediately to examine the title of the defendant-possessor-Manufacturers' title, and decided the case wholly thereon. This action of the Louisiana Supreme Court is apparent on the fact of the opinion.

After first examining the possessor's Manufacturers' title, the Louisiana Supreme Court held that the Louisiana Farm Lands Company acquired title to the 408 acres by a deed dated Dec. 15, 1910, in which the tract held to have been acquired was specifically excepted therefrom.

The court then held that Wisner Estates, Inc., acquired title to the 408 acres by deed dated April 21, 1917, also in which the tract was specifically excepted.

The Louisiana Supreme Court, without then requiring Blevins to prove a title from Wisner Estates, Inc., to himself, held that Blevins had acquired title from Wisner Estates, Inc., termed his "'immediate predecessor in title", by contracts dated May 22, 1940 and Dec. 12, 1945.

The court held that Wisner Estates, Inc. acquired title to the 408 acres by deed dated April 21, 1917, and based on that acquisition alone, decreed Blevins the owner of said property. The Court did not require Blevins to prove a title from Wisner Estates, Inc. to himself, or even to prove that Wisner Estates, Inc. was the owner of said 408 acre tract in 1940 or 1945. No reasons were assigned by the Court as to how title passed from Wisner Estates, Inc. to Blevins. Wisner Estates, Inc. had been judicially divested of said 408 acre tract in 1923.

LUTE NULLITY, in that the court totally failed to apply fundamental and mandatory requirements of the Louisiana law, that it recognized as controlling, in the following respects:

"(1) The Louisiana Supreme Court's action in examining Manufacturers' (defendant possessor in the petitory action) title, without first requiring Blevins to prove a valid title, as the court was compelled to do under the mandatory provisions of Articles 43 and 44 of the Louisiana Code of Practice;

"(2) The Louisiana Supreme Court's failure to follow the mandatory provisions of Articles 43 and 44 and compel Blevins to prove a chain of title between the years 1923 and 1940-45 from Wisner Estates, Inc. to himself.

"(3) The complete failure of the Louisiana Supreme Court to adhere to the mandatory provision of Art. 7, Sec 1 of the Louisiana Constitution of 1921 and adduce reasons for:

(a) Its arbitrary denial to Manufacturers of its procedural and substantive rights under the provisions of Articles 43 and 44 of the Louisiana Code of Practice;

(b) Adjudicating Manufacturers' property to Blevins on the strength of the 1940 and 1945 contracts with Wisner Estates, Inc., whose title had been completely lost at sheriff's sale in 1923."

concludes:

"The Louisiana Supreme Court completely failed to follow the mandatory law and require Blevins to prove *his* title before examining Manufacturers'

title, and completely failed to require Blevins to prove a title from Wisner Estates, Inc. to *himself*, or to prove a title in Wisner Estates, Inc. subsequent to its divestiture in 1923, as required in Article 44 of the Louisiana Code of Practice, which the court on rehearing recognized for the first time as controlling. The court failed to adduce any reasons for its failure to follow the mandatory law of this state as required by the mandatory provisions of Art. 7, Sec. 1 of the Louisiana Constitution of 1921. The Louisiana Supreme Court denied to appellant, a non-resident defendant, the equal protection of the Louisiana law and violated procedural due process in not according appellant its rights under the mandatory Louisiana law."

Appellees, in their turn, insisting that the district judge was right throughout, point out that in and by its very discussion appellant demonstrates that what and all it is seeking is to have relitigated and redecided in the District Court of the United States the matter finally adjudged in and by the Louisiana Supreme Court, that, in short, the suit is an effort to appeal to, and have reviewed for error in, the district court a final decision and judgment of the Louisiana Supreme Court, a procedure not provided for in, or known to, federal jurisprudence.

Arguing that the opinion and judgment under attack here, dealing as they do with and only with the State Law of Louisiana, constitute the law of Louisiana and are binding upon, and not reviewable in, any of the federal courts, particularly the district court, appellees insist that there is nothing in the State Court opinion and decree which presents, or could conceivably present, a

denial of due process of law or raise any question reviewable in and by the federal district court, and that any other conclusion would not only run counter to the settled law of the cases but would be contrary to right reason.

They argue that this is so because, in the first place, the complaint does not present a claim for which relief can be granted in the federal courts because a suit for such relief could not be brought in the state courts under the law of Louisiana;[3] in the second place, if a federal court could otherwise grant the relief by injunction sought by plaintiff, it is by Section 2283, Title 28 U.S.C. forbidden to do so; and, in the third place, if the prohibitions of Section 2283 do not prevent the relief sought here, it is settled under the general principles established in the cases that the complaint does not present a claim for relief cognizable in a federal district court.

Finally, they argue that if we accept appellant's claim that it is seeking federal question relief, the district judge correctly dismissed the suit because the complaint on that score presents nothing more than a claim that the decision of the Supreme Court violates federal due process because it is contrary to the recognized jurisprudence of Louisiana and, as shown in the multitude of cases they cite[4] where, as here, the state courts had jurisdiction

(3) Dulien Steel Products v. Connell, 252 F(2) 556.

(4) Some of these are: Ann. 13 A.L.R.(2) Sec. 23, "Effect of allegations attacking state court judgments for procedural or substantive error," p. 467, et seq.; Williams v. Tooke, et al, 108 F.(2) 758; Hudson v. Yount Lee, 108 F.(2) 759; Givens v. Moll, 177 F(2d) 765; Hudson v. Lewis, 188 F(2) 679; Rooker v. Fid. Tr. Co., 263 U.S. 413;

of the parties and the subject matter, such a claim does not present a violation of due process which a federal district court is competent to relieve against.

So arguing, they insist that this is so because the Federal Constitution and statutes do not attempt to, they do not confer upon federal district courts, and Sec. 2283, *supra*, forbids, supervisory jurisdiction by injunction or otherwise over state supreme courts in respect to a claim such as that asserted here, that its decision and judgment is contrary to state statutes or earlier decisions or practices of the court. Cf. *Horton v. Stegmyer*, 175 Fed. at 758, where it is said:

> "A federal court sitting in equity has jurisdiction to disregard or to enjoin the enforcement of an unconscionable judgment of a state or of a national court for new causes, such as fraud, accident, or mistake, which deceive the court into a wrong decree, or which prevent the judgment defendant from availing himself of a meritorious defense that was not fairly presented to the court which rendered the judgment. But it has no power *to take such action an account of errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the court which rendered the judgment or decree.* The reason of this rule is that cases of the former class present new controversies, which have never been raised in other courts, while *cases*

Wagner Elec. Co. v. Lyndon, 262 U.S. 226; Sexton v. Barry, 233 F(2) 229; Norwood v. Parenteau, 228 F(2) 148; 12 Am. Jur., "Constitutional Law," Sec. 577, "Effect of party being unsuccessful before tribunal; errors of tribunal", p. 273 Amalgamated Clothing Workers v. Richman, 211 F(2) 450; Aff. 348 U.S. 511.

of the latter class invoke a jurisdiction which does not exist, a jurisdiction in a federal court to review and revise the acts and decisions of courts of co-ordinate jurisdiction upon questions which they have lawfully considered and adjudged. National Surety Co. v. State Bank of Humboldt, 56 C.C.A. 657, 662, 664, 120 Fed. 593, 598, 600, 61 L.R.A. 394, and cases there cited. *The decree of the state curt is therefore valid, and it must be enforced and respected, unless the complainant has pleaded facts evidencing such a fraud as will warrant a disregard of it.*" (emphasis supplied).

We find ourselves in complete agreement with these views. Indeed, as shown in 12 A.J., page 273, note 4 *supra*, and cases cited above, they merely state hornbook law. The trouble with appellant's argument is that, without attacking the judgment for fraud or want of jurisdiction or alleging what the decision and judgment show to be the contrary, it assumes that it is not a judicial decision by the highest court of the state but a mere illegal fiating of persons having no jurisdiction or authority to act by which property, conceded to belong to one, is awarded to another. The fact, of which appellant seeks to make so much, that the three dissenters attack the decision and judgment as erroneous, is proof positive that the decision was a deliberate judicial act of the highest court of the state, in which, as it had a right to do, the court divided on the appropriate judgment to be entered. As the judgment of that court, whatever force it might have as stare decisis or a guide to future decision, it cannot be attacked in either a state or a federal trial court as without binding force and effect.

In *Hudson v. Lewis*. 188 F(2) at 684, this court said of a similar attack upon a judgment of a supreme court, there of Mississippi:

> "Quite to the contrary of the pitifully subservient place in our judicial system accorded by appellants to state courts by their claims under the facts, federal and state courts alike have spoken, they will continue to speak, without a dissentient note in one clear strain. This is to the effect that where a court, whether state or federal, acts within the competence of its jurisdiction, no other court may collaterally attack its judgment.
>
> "In the case particularly relied on by appellants and cases similar to those, where collateral attacks succeeded, the precise, the definite, basis of their success was that the court whose judgment was under collateral attack had not proceeded with jurisdiction. In some of them it had not acquired jurisdiction of the person or subject matter affected by the decree. In others, though it had acquired jurisdiction, it had, thereafter, and without the actual knowledge of the complaining person, proceeded in such manner as to deny him due process, that is, a fair and reasonable opportunity to be heard.
>
> "In short, in some of these situations, the court had not, in respect of the matter complained of, acquired jurisdiction. In others, it had proceeded beyond the jurisdiction theretofore acquired."

Cf. *Ballard v. First National Bank*, 259 F(2) 681, and *Drawdy Inv. Co. v. Leonard*, 261 F(2) 226.

What and all that appellant could have hoped to do below or could hope here was to convince the court that the decision of the Supreme Court of Louisiana was clearly contrary to the established jurisprudence of that state, and ,because it was, it was a nullity and therefore subject to collateral attack in a federal court. The law is otherwise written in all the books.

The judgment of the district court dismissing the suit was right. It is AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

JUDGMENT

Extract from the Minutes of June 29, 1959

MANUFACTURERS RECORD PUBLISHING COMPANY,

Appellant,

versus

MARGARET E. LAUER, the duly qualified & Authorized Testamentary Executrix of the Succession of Jacques E. Blevins, etc., et al,

Appellees.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed;

It is further ordered and adjudged that the appellant, Manufacturers Record Publishing Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * * *

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

ORDER DENYING REHEARING

Extract from the Minutes of July 28, 1959

No. 17735

MANUFACTURERS RECORD PUBLISHING COMPANY,

Appellant,

versus

MARGARET E. LAUER, the duly qualified & authorized Testamentary Executrix of the Succession of Jacques E. Blevins, etc., et al,

Appellees.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

* * * * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

• • • • • • • • • • • • • • • • • •

CIVIL ACTION

No. 8428

MANUFACTURERS RECORD PUBLISHING COMPANY,

Plaintiff

versus

MARGARET E. LAUER, the duly qualified and authorized Testamentary Executrix of the Succession of Jacques E. Blevins in Succession No. 325,086 of the Civil District Court, Division "B", Parish of Orleans, Louisiana; *LOUIS J. ROUSSEL* and REPUBLIC PETROLEUM CORPORATION,

Defendants

• • • • • • • • • • • • • • • • • •

WRIGHT, District Judge:

Plaintiff seeks a judgment from this Court declaring null and void the judgment of the Supreme Court of Louisiana in Suit No. 43,469 entitled "Jacques E. Blevins v. Manufacturers Record Publishing Company, et al,"(1) in so far as the judgment in that case affects Tracts 1 and 3 of certain described oil producing property. It also seeks an injunction restraining and prohibiting the defendants from enforcing or executing that judgment. The

(1) La. , 105 So. 2d 392.

Blevins case in the state court was a title contest over Tracts 1, 2 and 3, the Supreme Court holding that the heirs of Blevins were the owners of Tracts 1 and 3 whereas the plaintiff herein was the owner of Tract 2.

The jurisdictional basis for the action in this court is alleged to be the general equitable power of a federal court in diversity cases, as well as federal question jurisdiction based on the alleged denial of due process of law and equal protection of the laws by the state court in the proceedings aforementioned. Plaintiff alleges that the action of the state court was arbitrary and unreasonable in that its decision, depriving the plaintiff of title to Tracts 1 and 3, was based on erroneous principles not recognized by Louisiana law. It alleges that to enforce the state court judgment would be contrary to equity and good conscience..(2)

(2) Plaintiff's complaint, in pertinent part, reads:

"This is a suit of a civil nature, and is brought for the purpose of enjoining the enforcement of a certain judgment of the Supreme Court of Louisiana rendered on the 26th day of May, 1958, on the grounds that said judgment is null and void and should not 'in equity and good conscience be enforced,' and that Complainant has no adequate remedy at law under the laws of the State of Louisiana. The said judgment transfers property of Complainant to the defendants in absolute violation of the constitution and laws of the State of Louisiana and further in absolute violation of Complainant's property rights as guaranteed by the Constitution of the United States. As Complainant hereinafter shows, the Supreme Court of Louisiana arbitrarily and without cause, and in disregard of substantive and procedural rights of Complainant under Louisiana law, denied to Complainant due process of law and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, and in violation of Article 1, Sections 2 and 6, and Article 7, Section 1, of the Constitution of Louisiana."

Defendants have filed a motion to dismiss for lack of jurisdiction in this court and for failure to state a claim. They assert that, with certain specified exceptions, 28 U.S.C. §2283[3] prohibits a federal court from enjoining proceedings in the state court and that this action does not come within any of the exceptions.

The record, as now made up, shows that the state court title litigation, which is the basis of the action here, was fully heard both at the trial level and before the Supreme Court of Louisiana.[4] The trial court held that the plaintiff here, Manufacturers Record Publishing Company, was the owner of the property in suit. The Supreme Court reversed the trial court and held that the defendants here owned the property. On rehearing, the Supreme Court, while reaffirming its prior ruling as to Tracts 1 and 3, amended that ruling so that the ownership of Tract 2 was recognized in Manufacturers Record Publishing Company. The decision of the Supreme Court of Louisiana originally and on rehearing was by a divided court, 4-3.

At no point in the state proceedings was any federal constitutional question raised. The decisions by the trial court and by the Supreme Court were based on

(3) 28 U.S.C. §2283 reads:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

(4) The state court record consists of 1892 pages and 350 documents.

their conceptions of Louisiana law. The justices dissenting also referred only to Louisiana law as the basis for their dissents. No application for review of the state Supreme Court's ruling was made to the Supreme Court of the United States. The time for making such application has now expired and plaintiff has brought this proceeding asking that the state court judgment be declared null and execution thereof enjoined.

The short answer to this litigation is probably contained in two decisions of the Court of Appeals, of the Fifth Circuit. These two cases,(5) strikingly similar in facts to the case at bar, even to the extent that they involve title to oil producing land, hold that a federal district court has no jurisdiction to review the decisions of state courts, irrespective of the manner in which the relief sought in the federal court is styled. In the Williams and Hendron cases, the unsuccessful title litigants in the state court, charging the state court with arbitrarily and capriciously discriminating against them in failing to recognize their title to the land in suit, asked the federal court to declare the successful state court litigant a constructive trustee of the property and the unsuccessful state court litigant the beneficiary of the trust. The Fifth Circuit, in affirming the dismissal of the suits for want of jurisdiction, stated, "The purpose of the suit is

(5) *Williams v. Tooke*, 5 Cir., 108 F.2d 758; Hendron v. Yount-*Lee Oil Co.*, 5 Cir., 108 F.2d 759. In the Hendron case the jurisdictional basis was diversity and federal question. In Williams only the presence of a federal question was alleged. Compare *O'Boyle v. Bevil*, 5 Cir., 259 F.2d 506, and *Dulien Steel Products v. Connell*, 5 Cir., 252 F.2d 556.

clearly to seek a review of the decisions of the Texas courts * *." *Williams v. Tooke*, supra, 759.

Plaintiff here maintains that this is an independent action, that it is not asking this court to review the decision of the state court. Plaintiff insists that it merely wants the execution of the state court judgment permanently enjoined so that the defendant here would never be recognized as owner of the land in suit in spite of having been so declared by the Louisiana Supreme Court. Its request for such relief is not based on allegations of lack of notice or hearing, or perjury or other fraud in the state court proceedings. Plaintiff here simply alleges that the Supreme Court of Louisiana has misapplied the Louisiana law in reaching its result. If this is not seeking review of a state court decision it represents a distinction without a difference. Certainly the difference would not be discernable to the prevailing party in the state court. Moreover, if plaintiff is not seeking a review of the state court judgment, and is in fact proceeding independently of the state court action, then under the most elemental principles of res judicata, this action, absent circumstances neither alleged nor disclosed, is barred.

Assuming plaintiffs' action here is independent, and not a review, of the state court proceedings, and assuming further that res judicata does not provide a bar, in so far as its federal jurisdictional basis is diversity of citizenship, it is barred by the doctrine of *Dulien Steel Products v. Connell*, 5 Cir., 252 F.2d 556. There applying the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64, the

Fifth Circuit held that, since under Louisiana law the independent action was not available in courts of that state to nullify a judgment of the Louisiana Supreme Court, a federal court is without jurisdiction to entertain such action.(6)

In so far as plaintiff's action here is based on the presence of a federal question it is barred by *Booker v. Fidelity Trust Co.*, 263 U. S. 413. There the Supreme Court held that a federal district court had no jurisdiction of suits to nullify state court judgments, that only the Supreme Court can modify or reverse such judgments, and that to permit the bringing of a suit to nullify a state court judgment in the federal district court, after time for applying for relief from the Supreme Court has expired, would be to permit the unsuccessful litigant "to do indirectly what he no longer can do directly." *Booker v. Fidelity Trust Co.*, supra, p. 416.

The ancient independent action in equity, which apparently is what plaintiff has sought to bring here, originated in England at a time when the courts of law were separate from courts of equity. The law courts,

(6). In Dulien, supra, the federal court was asked to restrain the execution of the state court judgment "on the ground that the judgment was unconscionable and based upon mutual mistake of fact." *Dulien Steel Products v. Connell*, supra, p. 557. Judge Borah, writing for the Court, stated that "it would contradict the presuppositions of diversity jurisdiction for a federal court in the state to grant such relief, for it is now settled law that diversity jurisdiction must follow state law and policy. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188; Guaranty Trust Company of New York v. York, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079."

because of the rigors of the final judgment rule and the principle of res judicata, were unable to amend or reform their own judgments, however unjust they proved to be or however fraudulently obtained. In those circumstances the litigants sought relief in a court of equity through the independent action.(7) Now, in this country, with the separation between equity and law courts abolished, with law courts exercisiing equity powers as well, there is little justification for one court relieving against judgments of another except through appeals provided by law. There is even less justification for the courts of one system nullifying final judgments obtained in the courts of another.(8) This principle of comity was early recognized by the Congress(9) and by the courts in the federal system.(10) Hence the present prohibition, 28 U.S.C. §2283, against enjoining state court proceedings.

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(7) See Moore, "Federal Relief from Civil Judgment," 55 Yale L. J. 623.

(8) Review of federal questions arising in state court litigation is by appeal or writ of certiorari to the Supreme Court of the United States, 28 U.S.C. §1257. No other federal court has jurisdiction to review such questions by the independent action in equity or otherwise, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413.

(9) Section 5 of the Judiciary Act of 1793 provided:
"* * * nor shall a writ of injunction be granted (by any court of the United States) to stay proceedings in any court of a state * * *."
This provision of the Judiciary Act of 1793 was first qualified by Section 21 of the Bankruptcy Act of 1867. Section 21 added the qualification "* * * except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." From 1867 to 1948 the prohibition remained unchanged. In 1948 it was re-enacted in 28 U.S.C. §2283.

(10) See *Diggs & Keith v. Wolcott*, 8 U.S. (4 Cranch) 179. For the latest expression of the Supreme Court on the subject, see *Amalgamated Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511.

This statutory prohibition against enjoining state court proceedings has been broadly interpreted by the Supreme Court. It prohibits restraining the execution of a state court judgment as well as the proceedings prior thereto. *Hill v. Martin*, 296 U.S. 393, 403. Moreover, its purpose can not be frustrated by enjoining the litigants rather than the state court for restraint of the litigants is restraint of the courts. *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9.

Plaintiff cites several cases(11) as its authority for enjoining the execution of the state court judgment. These cases carved out a judicially created exception to the unqualified statutory prohibition(12) that a federal court shall not enjoin state court proceedings.(13) The

(11) *Wells Fargo & Co. v. Taylor*, 254 U.S. 175; *Simon v. Southern Railway Co.*, 236 U.S. 116; *Marshall v. Holmes*, 141 U.S. 589.

(12) See Note 9 supra.

(13) In attempting to justify federal court injunctions restraining state court proceedings in the face of the statutory prohibition, some of the cases cited by plaintiff say that restraining execution of a state court judgment is not a restraint of state court proceedings or that the federal court injunction restrains the parties not the state court. These equivocations have been uprooted from the jurisprudence. In *Hill v. Martin*, 296 U.S. 393, 403, in interpreting the statutory prohibition against restraining state court proceedings, the Court stated: "That term (proceedings) is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies * * * not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective." In *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9, again in interpreting the statutory prohibition stated "That the injunction was a restaint of the parties and was not formally direct-

continuing validity, however, of the doctrine of these cases is open to serious question. In *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 136, after reviewing against the background of the statutory prohibition, the cases cited by plaintiff here as justifying the issuance of an injunction against the execution of a state court judgment, the Supreme Court observed, "The foundation of these cases is thus very doubtful." Moreover, in *Amalgamated Clothing Workers of America v. Richmond Brothers Co.*, 348 U.S. 511, 514, interpreting 28 U.S.C. §2283, the Supreme Court, again referring to these same cases, stated "We need not re-examine the series of decisions prior to the enactment of Title 28 of the United States Code in 1948, which appeared to recognize implied exceptions to the historic prohibition against federal interference with state judicial proceedings. • • • By that enactment, Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation." In addition, the Courts of Appeal of the Second(14) and Third(15) Circuits, in referring to the

ed against the state court itself is immaterial." The decree of the district court was "thus within the plain interdiction of an Act of Congress, • • •." *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, supra, p. 8.

(14) *International Union v. Underwood Corporation*, 2 Cir., 219 F.2d 100.

(15) *Nongard v. Burlington County Bridge Commission*, 3 Cir., 229 F.2d 622. In Nongard, in interpreting 28 U.S.C. §2283, the Court stated at p. 625:

"Thus, absent any special legislative authorization, a court of the United States must refrain from enjoining state judicial proceedings unless the situation comes within some defined concept of 'aid (to) its jurisdiction' or 'protect(ing) or effectuat(ing) its judgments.' In our view it is not even arguable that either of these concepts is involved here. The

same line of cases, have flatly held that, by reason of the enactment in 1948 of 28 U.S.C. §2283, the exception to the prohibition recognized in those cases no longer exists.(16) The only holding to the contrary seems to be *Greyhound Corp. v. Leadman*, 112 F.Supp. 237. In behalf of that district judge, it should be stated that his opinion was rendered before the decision of the Supreme Court in Amalgamated Clothing Workers, supra, and before the cited cases from the Second and Third Circuits.

It is true, as plaintiff suggests, that the reference by the Supreme Court in the Amalgamated Clothing Workers case "that the prohibition (of 28 U.S.C. §2283) is not to be whittled away by judicial improvisation" may be dicta since the Court was there considering, not an application to enjoin enforcement of a state court judgment, but injunction of state court proceedings then in

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plaintiffs are merely complaining that a New Jersey equity court which had them before it adjudicated a controversy controlled by state rather than federal law in a way that was arbitrary and grossly unfair to them. In no meaningful sense can it be said that a federal court acts 'in aid of its jurisdiction' if it undertakes to enjoin what the state court has thus ordered. We conclude, therefore, that Section 2283 prohibits federal injunctive intervention here. It is also clear that the addition of a prayer for a declaratory judgment does not help the plaintiffs in their effort to impose a federal restraint upon the state proceedings. H. J. Heinz Co. v. Owens, 9 Cir., 1951, 189 F. 2d 505, certiorari denied 342 U.S. 905, 72 S. Ct. 294, 96 L.Ed. 677."

(16) Professor Moore originally was not in accord. See Moore, Federal Practice 60.39(2)(2nd Ed.). Now he has apparently accepted the decision of the Supreme Court in *Amalgamated Clothing Workers v. Richman Brothers Co.*, supra. See Moore, Federal Rules and Official Forms (1956) at p. 330.

progress. If it is, it is the kind of dicta that would give a responsible court pause because, in so declaring, the Supreme Court specifically referred to the cases relied on by plaintiff here by name. Moreover, as heretofore indicated,(17) the term "proceedings" as used in 28 U.S.C. §2283 "is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process." *Hill v. Martin*, 296 U.S. 393, 403.

Assuming that the cases cited by plaintiff have some continuing validity in spite of the Supreme Court's opinion in Amalgamated Clothing Workers, supra, and in spite of the re-enactment of the prohibition against enjoining state court proceedings in 28 U.S.C. §2283, the plaintiff's complaint still does not state a claim. In none of the cases relied on by plaintiff was relief sought on the ground that the state court was in error in interpreting its own jurisprudence, or because the state court acted arbitrarily and capriciously. The relief sought in all of these cases was predicated on fraud or lack of notice or hearing. Here there is no allegation of lack of notice or hearing.(18) As a matter of fact, the case was fully tried, between these same parties, at the trial level and twice heard by the Supreme Court of Louisiana. Nor is there any fraud alleged. As a matter of fact, it is expressly eschewed.(19) Nothing is alleged which would

(17) See Note 13.
(18) Compare *O'Boyle v. Bevil*, supra.
(19) In addition to failing to allege fraud, counsel for plaintiff in argument stated that he was not suggesting fraud, except in a technical legal sense, in connection with the state court proceeding.

justify this court setting at naught the proceedings before the state courts.[20]

Irrespective of the present position of the Supreme Court of the United States, as expressed in the Amalgamated Clothing Workers case, against enjoining state court proceedings, perhaps a federal court should strain to interpose its equitable arm to prevent the perpetration of an unconscionable fraud. But no court can act on rumor and gossip, particularly when even these are neither alleged nor otherwise in the record. The temptation to sit in judgment of the work of another court can, under some circumstances, be an appealing one. But, absent a compelling jurisdictional basis, it is a temptation which should be resisted. If the Supreme Court of Louisiana can be reversed, directly or indirectly, in one case by a federal district court, there are other unsuccessful litigants, both past and future, who will doubtless seek similar satisfaction. Thus, since the independent action in equity is uninhibited by time, the finality of state courts judgments would always remain open to question in the federal court.

DISMISSED.

/s/ J. SKELLY WRIGHT
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
January 7, 1959

(20) See Moore, Federal Relief from Final Judgment, 55 Yale L.J. 623, for outline of areas in which the independent action in equity may operate.

JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

* * * * * * * * * * * * * * * * * *

CIVIL ACTION No. 8428

MANUFACTURERS RECORD PUBLISHING COMPANY

versus

MARGARET E. LAUER, the duly qualified and authorized Testamentary Executrix of the Succession of Jacques E. Blevins in Succession No. 325,086 of the Civil District Court, Division "B", Parish of Orleans, Louisiana, LOUIS J. ROUSSEL and REPUBLIC PETROLEUM CORPORATION.

* * * * * * * * * * * * * * * * * *

This cause came on at a former day, to be heard on the motion of plaintiff for preliminary injunction herein and on the motion of defendants to dismiss this action, and after hearing argument of counsel for the respective parties, the matter was submitted when the Court took time to consider.

Now, after due consideration thereof and for the written reasons of the Court on file herein,

IT IS ORDERED, ADJUDGED AND DECREED by the Court that judgment be, and is hereby entered, in favor of the defendants and against the plaintiff, dismissing plaintiff's suit, with costs.

/s/ J. SKELLY WRIGHT
UNITED STATES DISTRICT JUDGE

JUDGMENT

DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

* * * * * * * * * * * * * * * * *

CIVIL ACTION No. 8428

MANUFACTURERS RECORD PUBLISHING COMPANY

versus

MARGARET E. LAUER, the duly qualified and authorized Testamentary Executrix of the Succession of Jacques E. Blevins in Succession No. 325,086 of the Civil District Court, Division "B", Parish of Orleans, Louisiana, LOUIS J. ROUSSEL and REPUBLIC PETROLEUM CORPORATION.

This cause came on at a former day, for hearing on the motion of plaintiff for new trial and rehearing, and after hearing argument of counsel for the respective parties, the matter was submitted when the Court took time to consider.

Now, on due consideration thereof;

IT IS ORDERED by the Court that the motion of plaintiff, for new trial and rehearing in this cause, be, and the same is hereby DENIED.

/s/ J. SKELLY WRIGHT
UNITED STATES DISTRICT JUDGE

JACQUES E. BLEVINS

v.

MANUFACTURERS RECORD PUBLISHING COMPANY et al.

No. 43469.

Supreme Court of Louisiana

Nov. 12, 1957

On Rehearing May 26, 1958

Hawthorne's Opinion on Rehearing

Oct. 14, 1958

Fournet's Opinion on Rehearing

Oct. 15, 1958

SIMON, JUSTICE.

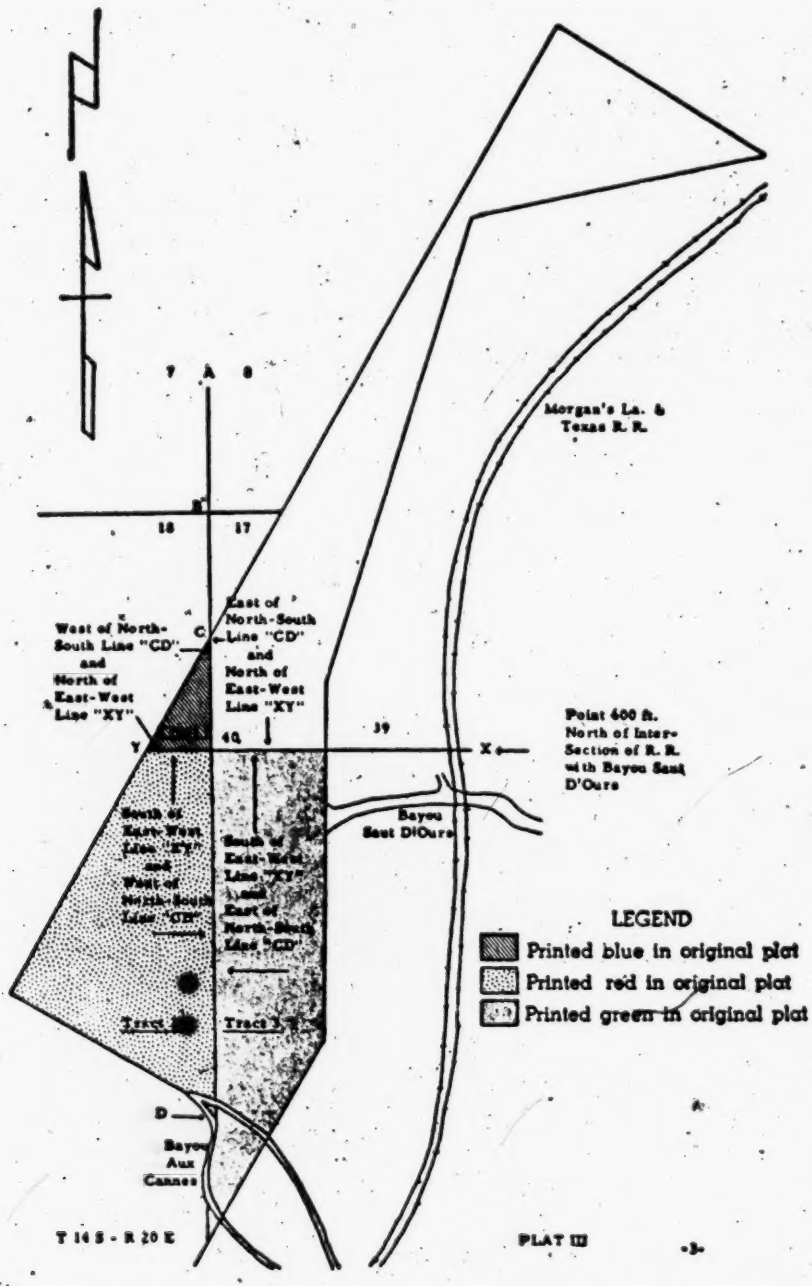
By this petitory action the plaintiff claims title to and possession of an irregularly shaped tract of land comprising 408 acres situated in Section 40, Township 14 South, Range 20 East, St. Charles Parish, Louisiana, shown on the free-hand tri-colored sketch of the plat shown in the record and described more fully in his petition as follows:

"Tract No. 1: That portion of Fractional Section 40 lying West of the Section line between Section 17 and Section 18, produced, and North of a line drawn West from a point on the center line of the Southern Pacific Railroad

track, said point being 600 feet North of the intersection of said Railroad track with Bayou Saut D'Ours, being in Township 14 South, Range 20 East, Southeastern Land District of Louisiana, West of the Mississippi River. The said tract being colored in blue on the sketch shown below.

"Tract No. 2: That portion of Fractional Section 40 lying West of the Section line between Section 17 and 18, produced, and South of the line drawn West from a point on the center line of the Southern Pacific Railroad track, said point being 600 feet North of the intersection of said Railroad track with Bayou Saut D'Ours, being in Township 14 South, Range 20 East, Southeastern Land District of Louisiana, West of the Mississippi River. The said tract being colored in red on said sketch.

"Tract No. 3: That portion of Fractional Section 40 lying East of the Section line between Section 17 and Section 18, produced, and South of a line drawn West from a point on the center line of the Southern Pacific Railroad track, said point being 600 feet North of the intersection of said Railroad track with Bayou Saut D'Ours, being in Township 14 South, Range 20 East, Southeastern Land District of Louisiana, West of the Mississippi River. The said tract being colored in green on said sketch."


7
A
8
Morgan's La. & Texas R. R.
18
17
West of North-South Line "CD" and North of East-West Line "XY"
East of North-South Line "CD" and North of East-West Line "XY"
C
Y
40
39
X
Point 600 ft. North of Intersection of R. R. with Bayou Sauk D'Ours
Bayou Sauk D'Ours
South of East-West Line "XY" and West of North-South Line "CD"
South of East-West Line "XY" and East of North-South Line "CD"
Tract 2
D
Bayou Aux Cannes
LEGEND
Printed blue in original plat
Printed red in original plat
Printed green in original plat
T 14 S - R 20 E
PLAT III
-3-

The trial court rendered judgment in favor of defendant and against the plaintiff, his heirs and assigns, dismissing his suit and rejecting his demand.

During the pendency of this suit below the plaintiff, Jacques E. Blevins, died and thereafter this case was prosecuted and this appeal is taken by his estate, appearing through the duly qualified and authorized testamentary executrix.

In order to properly dispose of the issues herein presented it is necessary to chronologically set forth the material and pertinent transfers pleaded by plaintiff in support of his alleged title, as well as those pleaded by defendants. At the outset it should be stated that the only land involved herein is a portion of fractional Section 40, Township 14 South, Range 20 East, as hereinabove platted and described, notwithstanding that the instruments of conveyance hereinafter referred to include the description of land or lands other than the subject property.

The transfers pleaded by plaintiff in support of his alleged title are as follows:

1. The act of sale dated September 10, 1906 by O. W. Crawford to Truck Farm Land Company, Ltd.

2. The tax sale of property assessed in the name of Truck Farm Land Company, Ltd. for the unpaid taxes for 1907, dated July 25, 1908 by the sheriff and ex-officio tax collector for the Parish of St. Charles to Allan T. Dusenbury, and confirmation thereof dated July 31, 1908.

3. The act of sale dated December 15, 1910 by Truck Farm Land Company, Ltd. joined by Allan T. Dusenbury, to the Louisiana Farm Land Company, Ltd.

4. The act of sale dated December 17, 1910 by the Louisiana Farm Land Company, Ltd., to Julius F. Funk.

By an act under private signature dated March 14, 1911 the said Funk transferred an undivided one-half interest in the said property to Harry C. Snell, who on August 21, 1911 by a similar act reconveyed same to Julius F. Funk.

5. The act of sale dated July 21, 1911 by Julius F. Funk and Harry C. Snell to J. Lahroy Slusher.

6. The act dated July 26, 1911 by J. Lahroy Slusher to the Louisiana Delta Lands Company.

7. The act dated November 21, 1913 by Louisiana Delta Lands Company to Edward Wisner.

8. The act dated April 21, 1917 by the executors of the estate of Edward Wisner to Mrs. Mary Jane Wisner.

9. The act dated April 21, 1917 by Mrs. Mary Jane Wisner to Wisner Estates, Inc., a Louisiana corporation.

10. By act under private signature dated May 22, 1940 amended by act dated December 12, 1945, the Wisner Estates, Inc. transferred to plaintiff herein an undivided one-half interest in the property. By act dated December 12, 1945 the Wisner Estates, Inc. transferred all of its right, title and interest in and to the subject property to plaintiff. All of said deeds were recorded in the conveyance records of the Parish of St. Charles. (The various mineral deeds executed, not being material to the issue herein, are not here delineated.)

In the act dated December 15, 1910 the property therein transferred by the Truck Farm Land Company, Ltd., joined by Allan T. Dusenbury to the Louisiana Farm Land Company, Ltd., appellant's author in title, is described in part as follows:

"All lots or Frc. Sec. 38, 39 and 40 except the previously sold portions of same which are as follows:

* * * * * * *

"There is also excepted from Sections 39 and 40 approximately 440 acres previously sold to Albert Phenis, as per private act passed before William Renaudin, Notary Public, and recorded in the Conveyance Records of St. Charles Parish, in Book ....., Page .....

"All of the above being in Township 14 South, Range 20 E."

Transfers executed subsequent to the said deed of December 15, 1910 excluded or excepted the approximately 440 acres previously sold to Albert Phenis, as above recited.

Plaintiff also pleads a ten-year prescriptive title and alleges that his author in title, Truck Farm Land Company, Ltd., from the date of its acquisition dated September 10, 1906, as did its successors in title, took and maintained actual open, notorious and uninterrupted physical possession as owner or owners thereof for a period in excess of ten years.

Plaintiff also presented a third or independent title based upon a tax deed dated July 20, 1920. For the year 1919 the subject property was assessed in the name of Wisner Estates, Inc.; and because of non-payment of taxes said property was adjudicated to the State of Louisiana on July 17, 1920. On or about June 11, 1921 the said property was redeemed by H. H. Timken, and on June 30, 1921 judgment was rendered recognizing him as having paid the full redemption price and, as a creditor, therefore subrogated to the rights of the State, including the liens and privileges bearing against each specific tract of land to the extent of the actual taxes bearing against the same. Thereafter in execution of said judgment Timken became the adjudicatee. On February 13, 1926, by act under private signature, the said Timken sold the subject property herein to the Border Research Corpor-

ation, the name of which was subsequently changed to the Louisiana Land and Exploration Co., who on December 12, 1945, sold and transferred the said property to Jacques E. Blevins, plaintiff.

The transfers pleaded by defendants in support of their alleged title are the following:

1. The tax sale dated July 25, 1908 by the sheriff and ex-officio tax collector for the Parish of St. Charles to Allan T. Dusenbury, and confirmation thereof dated July 31, 1908, being the same tax deed relied on by plaintiff.

2. The act of sale dated March 9, 1910 by Allan T. Dusenbury to Albert Phenis, the property therein being described as follows:

"That portion of lot or Fractional section 40 lying West of the section line between Sections seven (7) and eight (8) above, produced and a line drawn West from a point on the center line of the Morgan Louisiana and Texas R. R. Co., said point being 600 feet North of the intersection of said Railroad with Bayou Saut D'Ours, and, that portion of lot or Section Thirty-nine (39) bounded on the North by the above described land, on the East by the right of way of the said Morgan Louisiana & Texas R. R., on the South by Bayou Saut D'Ours, and on the West by Section Forty (40), all being in T. 14 S. R. 20 E. South Eastern Land District of Louisiana West of the Mississippi River and containing Four hundred and forty-two (442) acres, more or less; * * *."

3. The act of sale dated April 21, 1910 by Albert Phenis to Ray C. Power, the property therein described being the same as contained in the Dusenbury-Phenis deed of March 9, 1910.

4. The correction deed dated March 16, 1912 by Albert Phenis to Ray C. Power, purportedly correcting the

description contained in the Phenis to Power deed of April 21, 1910 so as to read the same as shown below in the Dusenbury-Phenis correction deed of April 18, 1912.

5. The correction deed dated April 18, 1912, by Allan T. Dusenbury to Albert Phenis purportedly correcting the description contained in the Dusenbury-Phenis deed dated March 9, 1910 so as to read as follows:

"That portion of lot or Fractional section 40 lying West of the section line between Sections seven (7) and eight (8) above produced and south of a line drawn West from a point on the center line of the Morgan's Louisiana and Texas Railroad Co., said point being 600 feet North of the intersection of said railroad, with Bayou Saut D'Ours, and that portion of lot or section thirty-nine (39) bounded on the north by the above described line on the east by the right of way of the said Morgan's Louisiana and Texas R. R., on the South by Bayou Saut D'Ours, and on the west by section 40, all in T. 14 S. R. 20 East; Southeastern Land District of Louisiana, West of the Mississippi river, and containing Four hundred and forty-two (442) acres, more or less; the description of said otherwise being correct."

6. The act of sale dated July 23, 1915 by Ray C. Power to Manufacturers Record Publishing Company, a defendant herein, the description therein contained being the same as that embodied in the Phenis-Power and Dusenbury-Phenis correction deeds as hereinabove set forth.

It is observed that the asserted titles of both litigants find their source in a common author, Allan T. Dusenbury.

It is also observed that by the said correction deeds the description in both the original Dusenbury-Phenis deed of March 9, 1910 and the original Phenis-Power

deed of April 21, 1910 was sought to be corrected so as to insert the words "South of" before the phrase "a line drawn west from a point on the center line, * * *" and so as to substitute the word "line" for the word "land", the latter change being made with respect to only that portion of land described as being located in Section 39. Hereinafter in disposing of the contentions of the parties our discussion shall be confined to the original Dusenbury-Phenis deed of March 9, 1910, and the Dusenbury-Phenis April 18, 1912 correction deed. Whatever rights flow from the Phenis-Power transactions are impertinent here.

Appellant attacks the legality and validity of the original Dusenbury-Phenis deed dated March 9, 1910 and contends that the description therein employed is meaningless and thus fatally defective, not subject to the identification of any specific tract of land sought to be conveyed, the defectiveness being such as not capable of serving as a deed translative of title to any land. With equal force he contends that his author in title acquired from Dusenbury by deed dated December 15, 1910 all of Section 40 except that portion of land acquired by Albert Phenis by deed dated March 9, 1910; that, the description contained in said deed of March 9, 1910 being meaningless and fatally defective as well as the source from which the exception obtains its force and color, the said exeception is equally fatal; and that therefore plaintiff's author in title, by virtue of the deed of December 15, 1910 became vested with full title to all of Section 40, on the ground that where the exception falls the property in its entirety, including that attempted to be excepted, becomes vested in the grantee.

Appellant further contends that the execution of the correction deed of April 18, 1912 was futile for the reason that in the December 15, 1910 deed Dusenbury divested himself of all right, title and interest which he

had or may have had to any and all of the lands therein conveyed and described and plaintiff's author in title became vested with full ownership of all of Section 40 including the land therein sought to be excepted.

The appellees concede that the March 9, 1910 deed may be burdened with ambiguity but contend that by employing alleged common practices and methods such as the supplying of specific calls and directions and substituting words for those therein contained the property described could be located and further that the correction instrument of April 18, 1912 validly and adequately supplied the boundary calls and specific directive omitted from the March 9, 1910 deed and therein substituted the word "line" for the word "land".

Appellees also contend that appellant's predecessors in title are estopped from claiming title to the disputed acreage for the reason that all transfers subsequent to the deed dated December 15, 1910 consistently excepted approximately 440 acres located in Sections 39 and 40, Township 14 South, Range 20 East previously sold to Albert Phenis and that therefore the recognition of this exception in the various transfers constituted an acquiescence in and a ratifaction of appellees' ownership thereof.

In the alternative appellees plead a ten-year prescription title in that they and their authors in title, under their respective acquisitions, went into actual, physical, open and undisturbed possession of said land remained in such possession during their respective ownerships for a period in excess of ten years and that therefore they have acquired a valid prescriptive title thereto.

Therefore we deem the primary issue to be whether or not appellant's predecessor in title acquired all of Section 40 in the deed dated December 15, 1910, or

whether the appellees' predecessor in title had theretofore acquired the three above-described tracts in Section 40 by virtue of the deed dated March 9, 1910. If the description in the March 9, 1910 deed is held to be sufficient to validly identify the land therein transferred then the necessity to consider any other aspect of this case is eliminated. If Phenis did in fact and in law acquire the land that appellees contend is described in the said deed, then appellant has no claim whatever to the property involved in this litigation. Hence, the title of appellees must rest exclusively on the validity of the description contained in the March 9, 1910 deed, and we are concerned primarily with (1) the interpretation of said description, and (2) the effect thereon of the correction deed dated April 18, 1912, both descriptions being shown above.

Referring to the above sketch of the plat shown in the record, the section line between Sections 7 and 8 is the line marked A-B and said line produced through Section 40 is the line marked C-D. The line drawn West from the point on the center line of the Morgan's Louisiana & Texas R. R. Co., said point being 600 feet North of the intersection of said railroad with Bayou Saut D'Ours, is the line East-West marked X-Y. The land enclosed West of line C-D and North of line X-Y is shown as Tract 1. The land enclosed West of line C-D and South of line X-Y is shown as Tract 2. The land enclosed East of line C-D and South of line X-Y is shown as Tract 3.

It is readily seen that in relation to the sketch the description in the March 9, 1910 deed calls for land lying West of line C-D and West of line X-Y. It is significant that if line X-Y is to be used as a boundary line the land bounded thereby must be located either North or South thereof, or both. Without a North or South directive it is obviously impossible to locate the land and intended to be described in said deed. Therefore, in order

to give meaning to the use of line X-Y as a boundary, a North or South directive, or both, must appear in and be a part of the description. For it is manifest that no land can be intelligently described as lying west of an East-West line; therefore such a directive is meaningless.

Appellees contend that the words "South of" should be inserted so as to show the land transferred as that portion or fraction of Section 40 lying West of line C-D and "South of" line X-Y, and thereby cause the description to read as follows:

"That portion of lot or fractional Section 40 lying West of the Section line between Sections 7 and 8 above, produced and *South of* a line drawn West from a point on the center line of the Morgan's Louisiana and Texas Railroad Company, * * *" (Inserted words italicized by us.)

Should we accept appellees' contention, which we do not, the land then described would obviously be enclosed within that area West of line C-D and South of line X-Y and thus limited to Tract 2 in the above sketch. Furthermore, there is just as much, if not more justification in adding the words "North of" instead of "South of", for as a matter of fact in the absence of a specific directive the land first enclosed upon the drawing of the specific lines C-D and X-Y would lie West of line C-D and North of line X-Y; and in such event the description would be limited to the area shown as Tract 1 in said sketch. Thus it is evident that by inserting either the words "North of" or the words "South of" to the same description and in the same manner two completely different results are obtained.

However, appellees argue that the embodying of the words "South of" in the description as above indi-

cated would include not only Tract 2, lying West of line C-D and South of line X-Y, but also Tract 1, lying West of line C-D and North of line X-Y, and Tract 3, lying East of line C-D and South of line X-Y. Whether we accept a North or South directive, to include Tract 3 in the description would obviously totally disregard the specific calls for land lying West of line C-D, there being no call for land lying East of line C-D.

Referring to the correction deed dated April 18, 1912, it is observed that the words "South of" have been inserted before the phrase "a line drawn West from a point on the center line, * * *" and the word "line" has been substituted for the word "land," the latter with respect to the portion of land described as being in Section 39, which section is not involved in this suit. It is also observed that the words supplied or changed by the correction instrument are the identical words employed by appellees in their endeavor to supply specific calls and directives to the apparently meaningless description contained in the original deed of March 9, 1910. The legal effect of said correction deed will be hereinafter discussed. However, if it can be held that the correction instrument validly corrected the description in the March 9, 1910 deed, then in that event the descriptive calls would, as above observed, place and limit the property to that area enclosed West of line C-D and South of line X-Y, shown on the above sketch as Tract 2.

Nevertheless, from a review of all of the expert testimony produced at the trial we are convinced that the evidence overwhelmingly establishes the facts that the description contained in the Dusenbury-Phenis deed of March 9, 1910 in view of the absence of boundary calls and directives utterly fails to definitely identify any specific property located within Section 40. The testimony of Fred N. Shutts, J. C. de Armas, Jr. and O. E. Young,

all qualified experts produced by the appellee, Humble Oil and Refining Co., is to the effect that it is impossible for any surveyor to locate the land described therein within the disputed area without first making the changes, additions and substitutions suggested by appellees and as hereinabove related. The expert witnesses for appellant, Earl M. Collier and Guy Seghers, also testified that from the calls and directives contained in said deed standing alone it was impossible to determine the specific land in Section 40 and that the description was meaningless unless boundary calls could be properly added.

The testimony of Dusenbury a certified surveyor as well as the common author of the litigants, must be considered by us as a repudiation of the contention of appellees that the description contained in the deed of March 9, 1910 covers Tracts 1, 2 and 3, the subject property. He freely admitted that said description, the basis of appellees' title, is so wanting in calls and directives that a person with ordinary sense would not have written such a description to describe the disputed subject property and that any intelligent person reading the document would know that the description therein given could not cover the subject property involved. Yet it is shown that Mr. Dusenbury himself was the sole grantor in said deed. His own opinion of its faulty description was emphatically emphasized when he testified and we quote him: "* * no one but a nitwit would not know that an error was made."

We find no more justification for adding one directive than we do for adding another. Although it is conceivable that boundary calls can properly be added to erase the ambiguity or uncertainty of description contained in some deeds, however, in the instant case in the light of the evidence, the boundary calls suggested by appellees cannot be considered justified.

The interpretation of the description contained in the March 9, 1910 deed vitally affects the interpretation of the exception contained in the December 15, 1910 deed, determining thereby the extent of the acquisition by plaintiff's author in title when he purchased all of fractional Sections 38, 39 and 40, excepting approximately 440 acres allegedly sold to Albert Phenis.

Taking first the contention of appellees that in the event the description of the Dusenbury-Phenis deed of March 9, 1910 should be declared meaningless and devoid of a description with such identity as to be translative of title, then in that event they argue that the Dusenbury-Phenis correction deed of April 18, 1912 clarifies the description and clearly covers the property involved in this suit. We conclude, however, that said correction instrument theretofore detailed can have no validating effect whatever upon the description contained in the March 9, 1910 deed. This is so for the reason that:

(1) the description contained in the March 9, 1910 deed is fatally defective, not possessing the attributes of a deed translative of title;

(2) the exception recited in the acquisition by plaintiff's author in title by deed dated December 15, 1910 must find its force and effect in the March 9, 1910 deed, and said latter deed being fatally defective and not translative of title said exception must be ignored and considered as not written;

(3) that Dusenbury having divested himself of all right, title and interest to all of Section 40 and the exception in the December 15, 1910 deed being considered as though not written, the said deed of December 15, 1910 in favor of plaintiff's author in title must be held to have conveyed the entire Section 40, including the part sought to be excepted.

The effect of an exception in a deed when the exception fails to validly identify the property sought to be excepted has long been settled in our jurisprudence.

In the case of Harrill v. Pitts, 194 La. 123, 193 So. 562, 564 there was involved a petitory action wherein plaintiff claimed the W½ of the SE¼ and the E 28 acres of the NE¼ of the SW¼ of Section 13, Township 23 North, Range 16 West, Caddo Parish, Louisiana. The defendants claimed that plaintiff's description was defective because it described 120 acres by governmental description, giving the quarter section, section number, township number and range, but ended with a reservation of twelve acres which, allegedly, were not properly identifiable. It was contended that the grantee, because of the unidentified reservation of 12 acres, could not locate the 108 acres which were intended to be purchased. In disposing of this contention this Court held that in view of the description giving the quarter section number, township number and range number same was sufficient to identify the conveyance. We further held that if the excepted property could not be located, then the *exception* was null and void and not the deed itself. In support of the conclusions reached by us we approvingly quoted from Volume 16, American Jurisprudence, page 619, and held as follows:

"'If an exception is not described with certainty, the grantee shall have the benefit of the defect. In other words, the exception, and not the whole deed, is void; and the grantee is invested with title to all the property mentioned in the deed disregarding the exception.'

"The above text is supported by a number of decisions of the Supreme Court of various states.

"The rule on the subject is thus stated in Volume 18, Corpus Juris, pages 347 and 348:

"'An exception should describe the property with sufficient certainty. Uncertainty or vagueness of description renders a reservation void unless there is something in the exception, deed or evidence, whereby it can be made sufficiently certain. * * *

"'A grant is not, however, necessarily vitiated because of the invalidity of an attempted reservation, nor because of an ambiguity in the exception. The fact that an exception is void for uncertainty has the effect merely to make the conveyance operative as to the whole tract, although it has been held that this rule does not apply where there is but a single description which is intended to describe the land conveyed. * * * An exception of a certain number of acres out of the corner of a square tract is sufficiently definite.'

"See, also, 27 R.C.L. 317 and Lange v. Waters, 156 Cal. 142, 103 P. 889, 19 Ann. Cas. 1207, 1209.

"In Southern Iron & Steel Co. v. Stowers, 189, Ala. 314, 66 So. 677, 679, the Court said:

"'Where a deed of bargain and sale on valuable consideration describes an entire tract of land * * * excepting a part, and the description of the part is vague and uncertain, the uncertainty affects the exception only, and that, not the grant, will fail. This results from two principles: That a deed delivered must have effect, if possible; and the bias of presumptive construction is inclined against the grantor who assumes to speak.'"

The Harrill case, supra, was cited in 162 A.L.R. 285, at page 288 et seq., in support of the general proposition of law which is stated as follows:

"The cases are practically uniform in holding that uncertainty of or insufficiency in the description of an area of land which the grantor or mortgagor attempts to

except from the operation of a deed or mortgage affects only the validity of the exception and not the validity of the instrument as a whole; accordingly the exception if so uncertain as to be void, will be ignored and the deed or mortgage will have the effect of conveying the entire tract described including the part sought to be excepted."

In the light of the evidence and law heretofore discussed the description contained in the deed of March 9, 1910 can little avail the appellees in their effort to identify the 440 acres mentioned in the exception contained in the deed of December 15, 1910 by virtue of which plaintiff's author in title acquired all of Section 40. Necessarily, the attempted description of the property sought to be conveyed in the deed of March 9, 1910 and carried as an exception in the deed of December 15, 1910 was so fatally defective and without legal meaning so as to render said exception null and void, thereby vesting in appellant's author in title the ownership of the entire fractional Section 40, Township 14 South, Range 20 East.

Although a deed conveying land must contain a description that identifies the transferred property, there is no specific provision in our Civil Code that sets forth the requisites of an adequate description; but our Courts have developed judicial requirements and have generally established and settled the rule of law in this State that if the description of property in a deed is either erroneous or misleading it is nevertheless susceptible of conveyance if the property intended to be conveyed by the parties can be ascertained with certainty by the aid of such extrinsic evidence as is admissible under the rules of evidence.

Since the early case of Kernan v. Baham, 45 La. Ann. 799, 13 So. 155, this court has adhered to the doctrine therein stated that parol evidence to establish

identity is allowable, as is likewise parol evidence of possession in aid of a defective or ambiguous description, but this is only in cases where there is a sufficient body in the description to leave the title substantially resting on writing, and not essentially on parol. This same general proposition is restated in Jackson v. Harris, 18 La.App. 484, 136 So. 166, 137 So. 655; and Lemoine v. Lacour, 213 La. 109, 34 So.2d 392.

In the instant case we are constrained to hold that the description contained in the original Dusenbury-Phenis deed of March 9, 1910 is so deficient in boundary calls or directives as to leave the title substantially resting not on what is contained therein but completely on the strength of parol or extrinsic evidence. Were we to resort to such evidence in aid of that which is meaningless in order to identify the property allegedly conveyed, we would be indulging in a rewriting of or a complete reformation of the deed forming the basis of appellees' claim. A distinction can readily be drawn in a case where an erroneous or ambiguous description is sought to be corrected and in a case where the grantor has failed to set out necessary calls, boundaries or directives to identify the property sought to be conveyed. In the former case a reformation of the instrument is always permitted as between the parties and in some cases even as between third parties. But in the latter case a contrary result obtains not permitting a complete reformation or rewriting of the deed, particularly where the rights of third parties have intervened, as we find here.

Relative to the correction instrument of April 18, 1912, both appellant and appellees contend that the description contained therein is unambiguous, and the trial judge so held, notwithstanding the different interpretations thereof made by the parties hereto. Appellant contends that if such correction deed validly corrected the March 9, 1910

deed, then and in that event the only property conveyed thereby is that designated as Tract 2, whereas appellees contend that by said corrected description all of the disputed land contained in Section 40, Tracts 1, 2 and 3 was conveyed thereby. Therefore, assuming arguendo that this correction was valid as well as unambiguous certainly the rule of law permitting parol and extrinsic evidence would not be applicable. LSA-C.C. Art. 2276; Smith v. Chappell, 177 La. 311, 148 So. 242; Snelling v. Adair, 196 La. 624, 199 So. 782; Doiron v. O'Bryan, 218 La. 1069, 51 So. 2d 628. Having previously disposed of the validity of the correction deed, no further analysis of said instrument and relative evidence is required.

Appellees have filed the acquisitive prescription of ten years under LSA-C.C. Art. 3478, which article provides that he who acquires an immovable in good faith and by just title prescribes for it in ten years. Under LSA-C.C. Art. 3479 one of the essential elements to support said acquisitive prescription is that the title shall be legal, and sufficient to transfer the property. It necessarily follows that where a deed is fatally defective as a record title it cannot form the basis of a ten-year prescriptive title.

In the case of McHugh v. Albert Hanson Lumber Co., 145 La. 421, 82 So. 392, 394, the defendant claimed title by the prescription ten years. The defect or absence of description in the title was held to be fatal to the plea. In so holding, we said: "For one of the requisites of the prescription of 10 years is a title translative of the property * * *; and in order to be translative of the property the title must identify it; and this, the tax collector title of defendant does not do. * * *"

In the case of Bendernagel v. Foret, 145 La. 155, 81 So. 869, 870, we said:

"We do not consider it sufficient, to support a plea of prescription of 10 years, that the description in the deed relied upon might be construed to include the land in question. It is necessary, to sustain the plea, that the deed relied upon is prima facie—not merely that the purchaser believed it to be—translative of the property in question. As to the title, of course, it is sufficient, to sustain the prescription of 10 years, that the purchaser, in good faith, believed that this vendor owned the property; but, as to the deed being upon its face translative of the supposed title, the description must include the property in question."

In the case of Castera's Heirs v. New Orleans Land Co., 125 La. 877, 51 So. 1021, 1023, in rejecting a ten-year prescriptive plea, we said: "If one takes possession of a tract of land under a deed which does not contain a description sufficiently correct to enable an average surveyor, in point of ability, to identify it, he cannot claim to be a possessor in good faith. * * *

"It is necessary that the description should be sufficiently complete to serve the purpose of identification."

See, also, Salmen Brick & Lumber Co., Ltd. v. H. Weston Lumber Co., 144 La. 186, 80 So. 249; Harang v. Gheens Realty Co., 155 La. 68, 98 So. 760; Bayard v. Baldwin Lumber Co., Limited, 157 La. 994, 103 So. 290; Ball v. Price, 168 La. 226, 121 So. 752; and Baldwin v. Arkanasas-Louisiana Pipe Line Co., 185 La. 1051, 171 So. 442.

Accordingly, since we are convinced that the deed of March 9, 1910 was hopelessly defective and was, therefore, not sufficient to be translative of title, it cannot form the basis for a ten-year prescriptive title.

The pleas of estoppel, ratification and acquiescence are based upon the contention that plaintiff and his authors in title, in various transactions subsequent to the acquisition of December 15, 1910 consistently recited the exception of "approximately 440 acres previously sold to Albert Phenis" and that these recitals have the effect of a recognition of defendants' ownership in and to said acreage. These pleas are equally unimpressive, for one can never be divested of his title to property except in the manner prescribed by law. Pearce v. Ford, 124 La. 851, 50 So. 771; Long v. Chailan, 187 La. 507, 175 So. 42; Gibson v. Pickens, 187 La. 860, 175 So. 600; and Snelling v. Adair, supra.

This leaves for our consideration the remaining contention of appellees that the acreage call of 440 acres contained in the March 9, 1910 Dusenbury-Phenis deed makes the otherwise defective description perfectly clear and unambiguous. In other words appellees contend that even were they to concede that the description by calls and bounds would serve completely different interpretations and would not encompass all of the property involved in this litigation, that the mere presence of the acreage call in said deed is sufficient to establish their title in and to Tracts 1, 2 and 3.

It is obvious that Section 40 contains acreage far in excess of 440 acres. Were we to employ the acreage call alone we would be at a loss to know whether this acreage should be confined within the limits of Section 40 and, if so, what specific location therein, or confined within Section 39, or located within both. This being true, it is manifest that in the absence of directives and proper calls to fix the location of the acreage with identifiable definiteness and certainty there is no justification for us to arbitrarily place the said acreage within Section 40 and segregate from said Section Tracts 1, 2 and 3 shown

on the above sketch as a valid and legal answer to the acreage call.

It is a well-established rule that the identification of land by acreage or quantity is the weakest, lowest ranking of all the enumerated standards or guides in describing property sought to be conveyed and, in the absence of specific and definite calls which afford the identity and location of the property, mere acreage calls alone without other means of identification, properly resorted to, fail to comply with rules applicable to the requirements of descriptions translative of title. See Bender v. Chew, 129 La. 849, 56 So. 1023; Nelson, Curtis & Nelson v. Bridgeman, 152 La. 190, 92 So. 855; City of New Orleans v. Joseph Rathborne Land Co., Inc., 209 La. 93, 24 So. 2d 275.

In his petition plaintiff alleges that he is further entitled to judgment forthwith ordering the Humble Oil & Refining Company, one of the appellees herein, to release and relinquish its possession of the property here involved and that said Humble Oil & Refining Company be ordered to render him a full accounting for any and all oil, gas and other minerals which it may have removed from said property .

Accordingly, for the reasons assigned, it is ordered that the judgment of the trial court be and the same is hereby annulled, reversed and set aside. It is further ordered that there be judgment in favor of the estate of Jacques E. Blevins, appearing through the duly qualified and authorized testamentary executrix recognizing it to be the true and lawful owner of and as such entitled to the immediate possession with all right, title and interest, in and to the following described property:

"Tract No. 1: That portion of Fractional Section 40 lying West of the Section line between Section 17 and

Section 18 produced, and North of a line drawn West from a point on the center line of the Southern Pacific Railroad track, said point being 600 feet North of the intersection of said Raidroad track with Bayou Saut D'Ours, being in Township 14 South, Range 20 East, Southeastern Land District of Louisiana, West of the Mississippi River.

"Tract No. 2: That portion of Fractional Section 40 lying West of the Section line between Section 17 and Section 18, produced, and South of a line drawn West from a point on the center line of the Southern Pacific Railroad track, said point being 600 feet North of the intersection of said Railroad track with Bayou Saut D'Ours, being in Township 14 South, Range 20 East, Southeastern Land District of Louisiana, West of the Mississippi River.

"Tract No. 3: That portion of Fractional Section 40 lying East of the Section line between Section 17 and Section 18, produced, and South of a line drawn West from a point on the center line of the Southern Pacific Railroad track, said point being 600 feet North of the intersection of said Railroad track with Bayou Saut D'Ours, being in Township 14 South, Range 20 East, Southeastern Land District of Louisiana, West of the Mississippi River."

It is further ordered that the Humble Oil & Refining Company release and relinquish its possession of the above described property to said owner thereof and that said Company render unto said owner a full accounting for any and all oil, gas and other minerals which it may, at any time, have removed therefrom.

It is further ordered that this cause be remanded to the lower court for a proper adjudication of all rights of the parties herein in accord with this decree.

All costs of this appeal to be paid by the defendants-appellees.

HAMITER, McCALEB and HAWTHORNE, J.J., dissent.

McCALEB Justice (dissenting).

I am in accord with the views expressed in the dissenting opinions of Justices Hamiter and Hawthorne.

The primary question for decision, it seems to me, is a simple one—indeed, one which readily answers itself adversely to plaintiff by an application of and an adherence to our substantive and procedural law.

This being a petitory action, plaintiff must succeed on the strength of his own title and not on the weakness of that of his adversary. Now, what is plaintiff's title and how is it derived? He has no paper title to the acreage claimed by him in this suit. Indeed, title to this acreage was specifically withheld and excepted from his title in the deed under which he, perforce claims. But he nevertheless asserts that he acquired ownership of the excepted property anyway. And how? Allegedly by reason of the circumstance that the acreage specially excepted by his vendor (because it had been previously sold to defendant's author in title) was fautily described in the conveyance to defendants' author in title. It is said this defective description produced unusual consequences—(1) it prevented defendants' author in title from acquiring the property he bought and (2) it brought about the vesting of title in plaintiff, even though the grantor of his author in title excepted the 440 acres in the deed. How did this transfer occur? This, says plaintiff, was made possible by the fact that the exception is too vague to describe the land not conveyed and, therefore, he (plaintiff) became, ipso

facto, the owner in virtue of the common-law doctrine adverted to in the case of Harrill v. Pitts, 194 La. 123, 193 So. 562, 565.

This claim of title, in my opinion, is illusory and wholly unsupported by any sound principle in law or reason. If such be the jurisprudence in other jurisdictions, it has no place in our civil law and should be emphatically rejected. However, as an examination of the authorities cited in Harrill v. Pitts, which is quoted from at length in the majority opinion, will readily disclose, this is not the rule at common law. True, there is a rule to the effect that, if an exception or reservation contained in a deed does not describe the excepted property with reasonable certainty, so that the excepted property can be identified either through the description in the deed itself or by means of extrinsic, competent evidence" (see Harrill v. Pitts), the exception or reservation will fall and not the whole deed. But that doctrine is wholly inapplicable to this case as I shall hereafter demonstrate.

As the authorities cited in Harrill v. Pitts will show, the doctrine which has been misapplied in this case, is founded on sound logic but is necessarily of limited scope. It has pertinence only and its use should be restricted to cases like Harrill v. Pitts, in which the grantor or his successors are challenging his grantee's title, claiming its entire invalidity because of an ambiguity of description in an exception or reservation in the deed. In such matters, the doctrine is that the deed must stand and it is only the exception that fails, the grantee obtaining the benefit of the failure. Why is this so? The cogent answer is given in Southern Iron & Steel Co. v. Stowers, 189 Ala. 314, 66 So. 677, 679 (quoted from in Harrill v. Pitts) where the court said:

> "This results from two principles: That a deed delivered must have effect, if possible; and the bias of presumptive construction is inclined against the grantor who assumes to speak."

In other words, this doctrine may be used as a defense by the grantee in instances where the grantor is attempting to defeat the conveyance, for then the principles upon which the doctrine rests are applicable, those principles, being that justice requires, where possible, to uphold deeds rather than destroy them and, further, that a grantor who seeks to strike down his own transfer is not looked upon with favor by the courts.

But how, in the case at bar, could these principles come into play? This is not a case in which the vendor, or anyone claiming under the vendor, is disputing plaintiff's title on the ground that the 440-acre exception contained in his deed is so uncertain that the property conveyed to plaintiff in Section 40 cannot be located. On the contrary, it is conceded that plaintiff owns all of the acreage he bought and paid for and no one assails his title to that property.

Therefore, plaintiff is not in a position to employ the doctrine he invokes in this case; he is not using it as a shield to uphold his own title to the land he bought but as a sword to acquire land excepted from the property he purchased. Thus, he would apply the rule in reverse. But this cannot and should not be permitted for—first, because, in a reverse of positions, the legal principles on which the invoked rule are founded (upholding the deed and bias of construction against the grantor) necessarily disappear and when the reason for a rule is not present, there is no basis for its application. Secondly, as plaintiff in a petitory action, this plaintiff must have a title to the property he claims. Since he has no title, he should

not be allowed to create a pseudo one to property specifically excluded from his deed, which is not under attack.

There are many more reasons why this action should be declared groundless, the most important ones being covered in the opinions of the other dissenting Justices. Hence, further comment on my part would be superfluous.

I respectfully dissent.

HAMITER, Justice (dissenting).

How this plaintiff can succeed on his title, which expressly and specifically excepts from its coverage the property in controversy, is beyond my comprehension. The majority holding that he should be permitted to do so plainly does extreme violence to the well-recognized legal principle, long established in our jurisprudence and enunciated in countless opinions, that for success in a petitory action the plaintiff must rely on the strength of his own title and not on the weakness of his adversary. Emerson v. Cotton, 209 La. 1003, 26 So. 2d 16; Parham v. Maxwell, 222 La. 149, 62 So. 2d 255 and Thurmon v. Hogg, 225 La. 263, 72 So.2d 500. See, also, Code of Practice Article 44, which recites: "The plaintiff in an action of revendication must make out his title, otherwise the possessor, whoever he be, shall be discharged from the demand."

The majority holding appears to be predicated almost wholly on our decision in Harrill v. Pitts, 194 La. 123, 193 So. 562. But clearly that case is inappropriate, for the excepted land therein was not in contest as is the excepted property here.

In any event the principal defendant herein has a good and valid title to the disputed land, as against all the world, by virtue of the prescription of ten years

acquerandi causa provided for in Revised Civil Code Articles 3478 and 3479. The evidence is overwhelming that such defendant has been in actual, continuous, peaceable and public possession of the entire tract as owner since prior to 1926; and unquestionably its acquisition of the property from Ray C. Powell on July 23, 1915 was accomplished in good faith and by a legal title translative of ownership.

I respectfully dissent.

HAWTHORNE, Justice (dissenting).

Plaintiff in this petitory action seeks to be recognized as the owner of a tract of land containing 408 acres in Section 40, Township 14 South, Range 20 East, St. Charles Parish, Louisiana, from which oil is being produced. The parties at interest in this litigation are, on the one part, Jacques E. Blevins, plaintiff, and his lessees, Louis J. Roussel and Republic Petroleum Corporation, of which Roussel is president, and, on the other part, defendant Manufacturers Record Publishing Company; its mineral lessee, Humble Oil & Refining Company, and numerous mineral and royalty owners. After trial the lower court dismissed plaintiff's suit and the instant appeal was taken.

According to the majority opinion the asserted titles of both plaintiff and defendant find their source in a common vendor, A. T. Dusenbury. On March 9, 1910, Dusenbury sold to Albert Phenis, defendant's author in title, a tract of land in Sections 40 and 39, Township 14 South, Range 20 East, containing 442 acres more or less. The tract of land conveyed was described by metes and bounds. Later two correction deeds were executed by vendors of the property in defendant's chain of title. By mesne conveyances defendant Manufacturers Record Pub-

lishing Company acquired the property in controvery on July 23, 1915, under the same description as that contained in the correction deeds.

On December 15, 1910, about nine months after the sale to Phenis, Dusenbury, the common vendor, sold all of Fractional Sections 38, 39, and 40 to Louisiana Farm Land Company, Ltd.,(1) but the land previously sold to Phenis was expressly excepted from this sale by the following provision in the deed to Louisiana Farm Land Company:

"There is also excepted in Sections 39 and 40 approximately 440 acres previously sold to Albert Phenis, as per private act passed before William Renaudin, Notary Public, and recorded in the Conveyance Records of St. Charles Parish, in Book ....., Page ....."

In every subsequent deed conveying Fractional Sections 38, 39, and 40, including the deed to plaintiff, the 440 acres previously sold to Albert Phenis were expressly excluded.

It is abundantly clear from an examination of the various deeds that plaintiff *has no record title* to the 408 acres here in controvery. In this petitory action he is attempting to have himself declared the owner of these 408 acres by virtue of an expressed exception or exclusion in his own deed.

It is well settled in the jurisprudence of this court that in a petitory action the plaintiff in order to recover must rely on the strength of his own title and not on the weakness of his adversary's. Smith v. Chappell, 177 La. 311, 148 So. 242, and authorities there cited.

(1) This actually was a sale by Truck Farm Land Company, Ltd. A. T. Dusenbury joined in the execution of this deed.

By the majority holding plaintiff here is being recognized as owner of the tract in question under an exception in his deed of acquisition by which that tract was expressly excluded. In other words, plaintiff, who has no record title to the disputed tract, in this petitory action is being recognized as the owner of the land although the land was expressly excepted in his deed and in the deeds of all his authors in title back to the common vendor of both defendant and plaintiff.

The majority opinion states: "* * * the attempted description of the property sought to be conveyed in the deed of March 9, 1910 [the deed to Phenis, defendant's author in title] and carried as an exception in the deed of December 15, 1910 [the subsequent deed to plaintiffs' author in title] was so fatally defective and without legal meaning so as to render said exception null and void, thereby vesting in appellant's author in title the ownership of the entire fractional Section 40 Township 14 South, Range 20 East."

From this statement it is apparent that the majority of the court begins by examining defendant's title and from this examination concludes that the description found in his deed is fatally defective. In other words, what the majority is saying is that the deed to Phenis to the 400-acre tract in Sections 39 and 40 conveyed nothing. The majority then turns to the deed from Dusenbury by which he conveyed all of these fractional sections and in which it was stated: "There is also excepted from Sections 39 and 40 approximately 440 acres previously sold to Albert Phenis, as per private act * * *". From this the majority concludes that the exception was null and void, and that plaintiff's author in title was therefore vested with the ownership of the entire Fractional Section 40.

If by this process the majority has found an apparently valid title in the plaintiff so as to put the title of defendant at issue, then the defendant should be permitted to prove by extrinsic evidence what property was actually conveyed to its author in title by the March, 1910, deed. The majority, however, has—erroneously in my opinion—denied defendant this right and allowed plaintiff to establish his title solely on the weakness of the defendant's title.

It is a well-settled principle of law that "a deed will not be declared void for uncertainty in description if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed. It is sufficient if the description in the deed or conveyance furnishes a means of identification of the land or by which the property can be located. * * * The maxim is 'that is certain which can be made certain;' and the Courts lean against striking down a deed for uncertainty of description of the land conveyed and a liberal rule of construction will be applied to uphold the conveyance". 16 Am. Jur. 585-586, Deeds, sec. 262; see 26 C.J.S. Deeds § 30, p. 640; Tricuit v. Burton-Swartz Cypress Co., 162 La. 319, 110 So. 489; Smith v. Chappell, 177 La. 311, 148 So. 242; White v. Ouachita Natural Gas Co. 177 La. 1052, 150 So. 15; Snelling v. Adair, 196 La. 624, 199 So. 782; Hargrove v. Hodge, La. App., 121 So. 224.

In Harrill v. Pitts, 194 La. 123, 193 So. 562, 565, the very case relied on by the majority opinion, this court said:

"Courts are always liberal in constring the description of property in deeds, so as to sustain, rather than defeat, the conveyance. 16 Am. Jurisprudence, 585, 586; 18C.J. 180, 181.

"The rule that the description in a deed will be sustained whenever the instrument affords any description by which the property can be identified, either through the description in the deed itself or by means of extrinsic, competent evidence, has been frequently approved by this Court."

In Snelling v. Adair, supra [196 La. 624, 199 So. 787], it was stated:

"It is a well settled rule of law in this state that if a portion of the description of property in a deed is either erroneous or misleading, it is nevertheless susceptible of conveyance if the property intended to be conveyed by the parties can be ascertained with certainty by the aid of such extrinsic evidence as is admissable under the rules of evidence * * *."

I concede, as I must, that the defendant's deeds contain an inaccurate or faulty description of the property, but this description is not so inaccurate or faulty as to be actually misleading. Under these circumstances extrinsic evidence to identify the property should be permitted. If a description is so misleading that it actually describes some property other than that sold, such extrinsic evidence is not admissible, for in such a case this evidence would not make the description certain but would actually change the record. See White v. Ouachita Gas Co., supra. In the instant case, however, the description in defendant's deed is not so misleading that it actually describes accurately some other property.

This record shows that neither plaintiff nor any vendor in his chain of title, nor any third party, has actually had adverse physical possession of any portion of the property acquired by defendant. Moreover, defendant and its predecessors in title were recognized as owners

by everyone who dealt with the property, and even by plaintiff himself, who in the year 1939 attempted by letters to purchase from this defendant a royalty under the tract. In fact, defendant's title remained unchallenged from 1910, the date of the Dusenbury sale, until some time in 1940, when plaintiff entered into a contract with a former property owner in the area to reacquire for that former owner, by suits if necessary, large tracts of land in the area. Although plaintiff's authors in title sold timber and granted trapping and mineral leases in Sections 39 and 40, and the rights granted under these contracts were exercised, there is no showing that any of these vendees or lessees exercised or sought to exercise their rights over any portion of the 400-acre Albert Phenis tract. Evidently they knew the location on the ground of this tract.

On the other hand, from 1910, the date of the Dusenbury sale, until the date of the trial defendant and its authors in title have been assessed with, and have paid, the taxes on the disputed property. For many years defendant and its predecessors have been in actual physical possession of the tract sold to Phenis containing 1,000 acres, of which the tract here in dispute forms a part.(2) In 1916 the then record owner evicted a tenant from a small area of this property for failure to pay rent. In 1923 and 1924 defendant sold the timber on the tract and caused a survey to be made, and the timber sold was cut and removed from the tract. Defendant also granted trapping leases under which its lessees have trapped over the land from 1934 to the present time.

(2) The lands conveyed were low, swampy lands, commonly known as Louisiana marsh lands. Before exploration for oil, the lands were by their nature suitable only for the trapping of fur-bearing animals and the cutting of timber from the ridges.

In 1938 it leased the property to the defendant Humble Oil & Refining Company, and this lessee caused a survey to be made by which the property was located on the ground. This lessee dug a canal on the property sufficiently large to accommodate a barge drilling rig, and conducted dredging operations on the property. Numerous wells were drilled on the property by Humble, and during its drilling activities camps were constructed comprising residences, garages, boathouses, offices, tool platforms, etc. Numerous drilling rigs were erected which operated around the clock. Tank batteries and pipelines were constructed on the property. In the course of these activities Humble actually drilled on the tract 11 producing oil wells. This lessee's activities on the property were still in progress at the time the case was tried in the court below.

A. T. Dusenbury, who sold the tract in question to Albert Phenis, defendant's author in title, in 1910, testified in this case on behalf of defendant and explained the facts and circumstances surrounding the making of his deed to Phenis. It is beyond question that as between these two the identity and location of the property were well known. In a conference between Phenis and Dusenbury it was decided what property was to be conveyed and just where the 442 acres were to be located in Section 39 and 40, and the map used by Dusenbury in preparing the deed was actually filed of record in the instant case. Phenis or his successors in title went into actual physical possession of the 442 acres in Sections 39 and 40. This evidence establishes conclusively what property Dusenbury intended to convey to Phenis, and what Phenis intended to acquire.

That the property intended to be conveyed could be definitely located on the ground is established by the fact that in the instant case Dusenbury, himself a surveyor, located and identified it on the ground by actual

survey. The record also shows that other engineers and surveyors identified and located on the ground the land which Dusenbury intended to describe and convey.

I can reach no other conclusion than that the description in the deed, with the aid of extrinsic evidence, is sufficient to establish what property Dusenbury intended to convey to Phenis. Moreover, I think the description in the deed furnishes a means of identification by which the property conveyed can be located with the aid of extrinsic evidence.

The trial judge was of the same view, for in his reasons for judgment he stated:

"The Court, accordingly, finds as a fact that defendant, Manufacturers Record, possessed the disputed property as owner by evicting Adam Sumler in 1916, by inspection and survey through its agent, A. T. Dusenbury in 1923, by the sale of timber to and the cutting of timber by its vendee, Iona Tie and Timber Company, in 1929-30-31, by the trapping activities of its lessee, Felix Dufrene, from 1934 to the present time and by mineral exploration and development of its lessee, Humble, from 1938 to date. All of these facts constituted possession which was 'continuous and uninterruped, peaceable, public and unequivocal,' as provided in Article 3487 of the Civil Code, and the Court finds as a fact that defendants did exercise possession of this nature during the times covered by the testimony.

"From a careful hearing of the expert testimony and observation of the witnesses on direct and cross-examination, *the Court concludes that the evidence in favor of the sufficiency of the descriptions by use of competent evidence is clear and convincing.* In addition the Court finds it difficult, if not impossible, to reconcile

the inability of plaintiff's expert witnesses to locate the disputed property with the total absence of any testimony that any one of the numerous persons shown by the record as having dealt with the property in question experienced any difficulty whatever in locating the 440-acre Albert Phenis tract. On the contrary, the record is replete with testimony of witnesses who experienced no difficulty whatever in locating and exercising the rights acquired on the Albert Phenis 440-acre tract of land." (Italics mine.)

The majority in this case relies on the case of Harrill v. Pitts, 194 La. 123, 193 So. 562, and certain pronouncements quoted there from Corpus Juris, American Jurisprudence, and Ruling Case Law.

In the Harrill case plaintiffs argued that a deed was defective "because of the failure to properly describe the property. Their contention is that the description of the property is defective because the deed describes 120 acres by governmental descriptions * * * ending with a reservation of 12 acres therefrom, but does not describe the excepted 12 acres and, therefore, the grantee cannot locate the 108 acres which were intended to be purchased". This court found that the sale of 108 acres was a valid sale. In the course of that opinion the court stated that if an exception in a deed is not described with certainty, the exception and not the whole deed is void. This statement was dicta in that case, as the court found that the 12 acres excepted were adequately identified and properly described, and in the course of the opinion was careful to point out that "The rights and title of the owner of these twelve acres are not in dispute, in this case". In the instant case the title to the tract excepted in plaintiff's deed is in dispute. Moreover, plaintiff here is not contending, as were plaintiffs in the Harrill case, that the deed which contains the exception is null and void in its

entirety. Under these circumstances I do not think this case can be accepted as authority for the conclusion reached by the majority in the instant case.

The plaintiff in the case at bar is being allowed to recover a 408-acre tract for which neither he nor any person in his chain of title ever paid one dime. This is made clear by the fact that at the time Truck Farm Land Company, Ltd., joined by Dusenbury sold the land to Louisiana Farm Land Company, Ltd., the conveyance was made at so many dollars per acre, and the purchaser paid only for the actual number of acres called for in his deed. And as we have said, this act as well as all others in plaintiff's chain expressly excepted the Albert Phenis tract.

The judgment appealed from should be affirmed.

On Rehearing

TATE, Justice ad hoc.

By this petitory action the plaintiff(1) claims title to approximately 408 acres of land situated in Section 40, T. 14 S., R. 20 E., St. Charles Parish. The principal defendants are the Manufacturers Record Publishing Company, which allegedly acquired title to the property in question by recorded deed of 1915, and the Humble Oil and Refining Company, Manufacturers' mineral lessee.(2) (For convenience in discussion, reference to the "defendant" or to "Manufacturers" will include where indicated

(1) The action was originally brought by Jacques E. Blevins, who died prior to the trial in the district court. By appropriate motion Margaret Lauer, his testamentary executrix, was substituted as party plaintiff, although for convenience in discussion we will hereinafter refer to Blevins as the plaintiff.

(2) The other defendants are claimants to mineral interests affecting the property.

not only Manufacturers itself, but also those defendants whose interest derives from this defendant landowner.)

The original opinion of this court granted judgment in plaintiff's favor, reversing the district court's dismissal of the suit. All issues of this appeal have been reconsidered upon this rehearing.

The facts are fully stated in our former opinion and will not be reiterated except where necessary to clarify the discussion.

The rival title claims of the parties to this action stem respectively from two sales in 1910 of portions of a parent tract by Allan T. Dusenbury, the common author of the titles of both plaintiff and defendants. It is unnecessary to deraign title back beyond Dusenbury's acquisition of the parent tract at tax sale in 1908, for where adverse claimants to property trace their titles to a common source, neither can attack the title of their common author from whom both claim. Pecot v. Prevost, 117 La. 765, 42 So. 263; Rocques' Heirs v. Leveque's Heirs, 110 La. 306, 34 So. 454; Bedford v. Urquhart, 8 La. 234.

Plaintiff's ancestor in title, the Louisiana Farm Land Ltd., acquired approximately 15,000 acres of land from Dusenbury by deed dated December 15, 1910, including the following described tract in T. 14 S., R. 20 E:

"All lots or frc. Secs. 38, 39 and 40 except [Certain lots or tracts not here in question].

"There is also *excepted from Sections 39 and 40 approximately 440 acres previously sold to Albert Phenis, as per private act passed before William Renaudin,* Notary Public, and Recorded in the Conveyance Records of St. Charles Parish, in Book ....., Page ....." (Italics ours.)

The substantial issue of this appeal concerns whether the exception above italicized excepted from acquisition by plaintiff and his ancestors in title the tract of land here in dispute; or, rather, whether as plaintiff in this petitory action Blevins has borne his legal burden of proving that all or part of said tract did not fall within the exception from such acquisition of his predecessors in title.

Defendant Manufacturers, which admittedly was in possession of the disputed tract in 1943 at the institution of judicial proceedings concerning plaintiff's claim of title thereto, contends that the disputed tract containing approximately 408 acres of land in Section 40 forms (together with 32 acres in Section 39) the tract excepted from acquisition by plaintiff's ancestor in title as having been previously sold by Dusenbury to Phenis.

This prior deed from which Manufacturers deraigns its title was executed on March 9, 1910, before William Renaudin, Notary Public. The description in this conveyance of certain land by Dusenbury to one Albert Phenis for the sum of $442 was purportedly corrected by a correction deed between these same parties, dated April 18, 1912, and shortly thereafter also recorded in the conveyance records. By a deed of July 23, 1915, Manufacturers acquired from an intervening purchaser from Phenis the property originally sold to Phenis according to its corrected description, as follows:

"*That portion of lot or fractional section 40 lying west of the section line between Sections seven (7) and eight (8) above, produced and south of a line drawn west from a point on the center line of the Morgan's Louisiana & Texas RR Co., said point being 600 feet North of the intersection of said railroad, with Bayou Saut D'Ours,* [and that portion of lot or section thirty-nine (39) bounded on the north by the above described line on the east

by the right of way of the said Morgan's Louisiana and Texas R.R., on the South by Bayou Saut D'Ours, and on the west by section 40], all in T. 14 S., R. 20 E., Southeastern Land District of Louisiana, west of the Mississippi River, and containing Four hundred and forty-two (442) acres, more or less * * *." (Italics and brackets[3] added by this court.)

The italicized portion of the description is the basis of defendant's claim of title to the disputed tract.

Primarily, the opposing parties each claim title to the property through conveyances from Dusenbury and his assignees. It should be emphasized here that there is no claim by either plaintiff or defendant to any portion of the tract by prescriptive title resulting from thirty years' adverse possession without title, LSA—C.C. Arts. 3499, 3548, as it is conceded that neither party had possession thereof for thirty years prior to interruption by suit.

Plaintiff contends that: (a) He acquired by mesne conveyances from Louisiana Farm Land Limited whatever portion of Section 40 this company acquired from Dusenbury by its deed of December 15, 1910, which included the property here in question since the attempted exception of property previously sold to Phenis was ineffectual as unidentifiable because the description in the prior 1910 sale by Dusenbury to Phenis was meaningless; (b) alternatively, if the Dusenbury-Phenis correction deed of 1912, recorded subsequent to Louisiana Farm Land's acquisition from Dusenbury of his remaining interest in Section 40, can be held to affect plaintiff's title, then that defendant's title is limited to the property clearly and un-

(3) THe portion of the description enclosed in brackets by this court clearly describes a small tract in Section 39 (see plat printed with original opinion), ownership of which by Manufacturers is conceded by plaintiff and which plays no further part in this opinion.

ambiguously described by such deed, namely, the 183 acre tract referred to as "Tract 2" in the pleadings and evidence (and thereas denoted on the plats incorporated in the original and present opinions of this court).

Defendant's contrary contentions may be summarized as follows: (a) That since this is a petitory action, plaintiff may not recover on the weakness of defendant's title—even conceding that the original Phenis deed upon which defendant's title is based is meaningless—because his own title excepts approximately 440 acres previously sold to Phenis, which plaintiff cannot prove may not have included the property here in dispute; (b) that in any event the descriptions of both the 1910 and 1912 Phenis-Dusenbury deeds describe the entire disputed area of Section 40, and, if ambiguous, by extrinsic evidence the intent of the parties to do so may be proved.

Simply stated, since there is no prescriptive title by adverse possession concerned, the primary question before us is to determine which party has title to the property in dispute. However, Blevins may not recover the property simply because defendant lacks title to it, since, in a petitory action such as the present, the plaintiff out of possession must make out his title to the property claimed and must recover upon the strength of his own title and not upon the weakness of the defendant possessor's. Articles 43 and 44 of the Code of Practice; Albritton v. Chilers, 225 La. 900, 74 So. 2d 156; Thurmon v. Hogg, 225 La. 263, 72 So.2d 500; Parham v. Maxwell, 222 La. 149, 62 So.2d 255; Waterman v. Tidewater Associated Oil Co., 213 La. 588, 35 So2d 225; Dugas v. Powell, 197 La. 409. 1 So.2d 677; Cook v. Martin, 188 La. 1063, 178 So. 881; Smith v. Chappell, 177 La. 311, 148 So. 242.

Before discussing the respective contentions of the parties, we think it appropriate to restate some fundamental principles regarding the acquisition of title to immov-

ables in Louisiana, subject to which all parties herein acquired their alleged interest in the lands presently in question.

In the first place, "Every transfer of immovable property must be in writing * * *." Article 2275 of the LSA—Civil Code. "All sales of immovable property *shall* be made by authentic act or under private signature * * *." Article 2440 of the LSA—Civil Code. In accordance therewith, it is well settled that parol evidence may not be used to establish title to immovables (Louisiana State Board of Education v. Lindsay, 227 La. 553, 79 So. 2d 879; Lemoine v. Lacour, 213 La. 109, 34 So2d 392; Ceromi v. Harris, 187 La. 701, 175 So. 462; Ruth v. Buwe, 185 La. 204, 168 So. 776); nor, in the absence of a written instrument, may title to immovables be created by estoppel. Waterman v. Tidewater Associated Oil Co., 213 La. 588, 35 So2d 225; Pan American Production Co. v. Robichaux, 200 La. 666, 8 So2d 635; Gibson v. Pickens, 187 La. 860, 175 So. 600. (Italics ours.)

Further, "no notarial act concerning immovable property shall have any effect against third persons, until the same shall have been deposited in the office of the parish recorder, or register of conveyances of the parish where such immovable property is situated." Article 2264 of the LSA—Civil Code. See, also, Article 2253. "All sales, contracts and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except between the parties thereto * * *." Article 2266. Under this principle, and since the famous leading case of McDuffie v. Walker, 125 La. 152, 51 So. 100, it is firmly established in our jurisprudence that a third party purchaser may rely upon the conveyance records and is not bound or barred by unrecorded claims against the property purchased, even though he has actual notice thereof gained from outside the records.

Haynes v. King, 219 La. 160, 52 So.2d 531; Humphreys v. Royal, 215 La. 567, 41 So2d 220; Chachere v Superior Oil Co., 192 La. 193, 187 So. 321; Westwego Canal & Terminal Co. v. Pizanie, 174 La. 1068, 142 So. 691; Coyle v. Allen, 168 La. 504, 122 So. 596; Gonsoulin v. Sparrow, 150 La. 103, 90 So. 528.

As we recently restated in Wells v. Joseph, 234 La. 780, 101 So.2d 667, 669, quoting from Martin v. Fuller, 214 La. 404, 37 So.2d 851, 856, "Unlike the rule at common law, it is the public policy of this state that in order to affect third parties, all transactions touching upon or affecting title to real or immovable property must be recorded. As stated in the case of Baker v. Atkins, 107 La. 490, 32 So. 69, 70, 'there can be no actual owner of immovable property, so far as third persons are concerned, other than the owner of record."(4)

Having in mind these fundamental principles regarding acquisition and proof of title in Louisiana to immovables, so strictly adhered to and founded upon our public policy and the social purpose of assuring stability of land titles and entitling purchasers and others in land transactions to rely upon the public records, we think plaintiff correctly urges that, in determining what is excepted from his acquisition by the exception clause in question, he and those in his chain of title are entitled to rely upon what the *conveyance records* show Phenis and

(4) See LSA-R.S. 9:2721, where this fundamental tenet of our property law is reiterated thusly: "No sale, contract, counter letter, lien, mortgage, judgment, surface lease * * * or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry in the office of the parish recorder of the parish where the land or immovables is situated; and *neither secret claims or equities nor other matters outside the public records shall be binding on or affect such third parties.*" (Italics ours.)

those claiming from Phenis acquired from Dusenbury in 1910; and that what the conveyance records show to have been excepted from plaintiff's acquisition cannot be enlarged or differed by extrinsic evidence contradictory thereof.

If this were not so, when many years later these inconsequential and unoccupied swamp lands became of great value through the possibility of mineral exploitation, those claiming title on the basis of the clause specifically excepting certain otherwise unidentifiable acreage previously sold to a prior purchaser could—in violation of the public policy expressed by the above-stated principles which recognize the historic unreliability of such extrinsic hindsight or self-serving evidence—select for their own ownership such portions of the property acquired by plaintiff as indicated by(5) the vague remembrances of witnesses many years later, unrecorded and self-serving correspondence and evidence concerning alleged dealings with the property, or theoretical deductions of highly paid employees or experts as to what what was allegedly *intended* to have been excepted, irrespective of what the recorded deeds show to have been *actually* previously conveyed to their own predecessor in title.

Likewise, in view of these fundamental principles, we regard as untenable defendant's contention that the plaintiff cannot carry his burden of proving title in this petitory action to the acreage sought in Section 40 simply

(5) The following observations are by way of illustration only and specifically without reference to the witnesses or evidence in the present proceeding. Assuming that such evidence as defendant offered here proves that Dusenbury's intention in 1910 was to convey all of the property in dispute to Phenis, and that the reliability of such present proof is unquestioned, nevertheless, the illustrations indicate why as a matter of public policy this type of proof is not admissible over objection to prove by itself title to immovables in Louisiana.

because his chain of title excepts from acquisition "approximately 440 acres sold to A. Phenis"(6) and without any reference at all to what the conveyance records show to have been actually sold to Phenis. If the otherwise unidentifiable exception by itself thereby defeats plaintiff's title to the land presently claimed by him in Section 40, it defeats his claim against a possessor to any portion of Sections 39 and 40 (for the same argument may be made that "approximately 440 acres" in Sections 39 and/or 40 is excepted from his acquisition which might include any tract sought therein so that plaintiff cannot prove his own title thereto), in contravention of the legal principle noted in our original opinion that an exception from a sale of unidentifiable property, rather than voiding the entire conveyance deed is itself void, cf. Harrill v. Pitts, 194 La. 123, 196 So. 562.

Or, if defendant's contention is interpreted to urge that extrinsic evidence is available to prove that the exception included more or other than what the conveyance records show to have been excepted from plaintiff's ac-

(6) In the six deeds in plaintiff's chain of title in 1910 and 1911 wherein Sections 39 and 40 (included in approximately 15,000 acres) were conveyed, the exception is described as stated by the original conveyance by Dusenbury to plaintiff's author in title, i. e., "There is also excepted from Sections 39 and 40 approximately 440 acres previously sold to Albert Phenis as per private act passed before William Renaudin, Notary Public, and recorded in the Conveyance Records of St. Charles Parish * * *." Plaintiff originally acquired in 1940 from Wisner Estates, Inc., which in 1917 (in the wording of the exception as stated in the intervening conveyances of 1913 and 1917) had acquired title in a conveyance of approximately 6,500 acres to: "All Sec. 40 and that portion of Sec. 39 North of S. P. R. R. tract except approximately 440 acres sold to A Phenis in T. 14 S., R 20 E." The description in plaintiff's acquisition, as corrected by deed in 1945, plainly included the tract here in question, but of course the self-help of this corrected description is not available in aid of plaintiff's claim.

quisition by the previous conveyance thus specifically excepted, such contention flouts the above-summarized basic rules of Louisiana law that title to immovables may not be created by parol or other extrinsic evidence, nor written title thereto destroyed by such evidence, and that the claims of third persons who acquired property on the basis of recorded title thereto cannot be defeated by unrecorded claims or equities. For the same reason, we find inapplicable common-law jurisprudence cited to us to the effect that exception clauses per se render deeds ambiguous, so that as even against subsequent purchasers in the chain of title extrinsic evidence not of record may be offered to show what originally was conveyed and what originally was excepted.

In referring to the conveyance records to determine what land had been acquired by Albert Phenis from Dusenbury so as to be excepted from the acquisitions by plaintiff's ancestors in title, in our original opinion we found the description in the 1910 deed to be so completely defective as to be meaningless, so that proof of what was intended to be conveyed thereby would rest the title essentially upon parol and not substantially upon the writing in contravention of law. Cf. Lemoine v. Lacour, 213 La. 109, 34 So.2d 393. We further held that since the identity of the property excepted could not be identified as of 1910 when plaintiff's ancestor in title acquired the property, then the exception rather than the deed itself was void. Harrill v. Pitts, 194 La. 123, 193 So. 562.

Our further consideration of this holding has not convinced us that we were in error, were we solely concerned with what plaintiff's predecessor in title had acquired by the deed of 1910. But under our present view of the matter, and upon our reconsideration of the entire record and all acquisitions involved, we do not believe that we are called upon to decide this point, for the present plaintiff's title stems not only from the 1910 deed

but also from subsequent deeds, including that of 1917 by his immediate predecessor in title in which was specifically excepted from the acquisitions of Sections 39 and or 40 "approximately 440 acres sold to A. Phenis."

A third party in dealing with property is charged with knowledge revealed by the recorded instruments affecting the property. Wells v. Joseph 234 La. 780, 101 So.2d 667; Wise v. Watkins, 222 La. 493, 62 So.2d 653; Otis v. Texas Co., 153 La. 384, 96 So. 1. In the Wise case this court said with reference to a similar situation: "The defendants [herein, the plaintiff] cannot single out a single one instrument on the public records and disregard the other instruments * * * The records as a whole must be taken into consideration and they are bound by what they reveal." [222 La. 493, 62 So.2d 656.]

The evidence reflects that the only recorded conveyance of lands to Albert Phenis in Sections 39 and 40 was the deed from Allan T. Dusenbury in 1910, as corrected in 1912. The conveyance records of St. Charles Parish further reflect that from Phenis through an intervening vendee the present defendant acquired by the corrected description whatever land in Sections 39 and 40 had been purchased by Phenis. As will shortly be shown, the corrected description plainly and unambiguously describes a portion of the land in Section 40 presently claimed by plaintiff. Plaintiff's acquisition was thus subject to this previous deraignment of clearly described land of which he was put on notice by specific reference thereto in his chain of title.

Plaintiff's contention that his title stemming from the claim of his ancestor to the entire tract arising from his alleged acquisition thereof in 1910 could not be defeated or limited by his ancestor's vendor's subsequent execution of the correction deed in 1912 overlooks in our opinion,

that the ancestor's claim to the entire tract does not arise because no property was *intended* to have been excepted by the clause specifically excepting the land previously sold to Phenis from the acquisition, but because no competent evidence was admissable to prove *what* property was accepted.

Phenis' acquisition from Dusenbury by the deed of 1910 (conceding the description therein to be meaningless) was not, as between the parties, absolutely void. By correction deed or timely action to reform an original deed, the description may be corrected as between the parties to re their true intent. Agurs v. Holt, 232 La. 1026, 95 So.2d 644; Haas v. Opelousas Mercantile Co., 197 La. 500, 2 So.2d 3; Reynaud v. Bullock, 195 La. 86, 196 So. 29; Broussard v. Succession of Broussard, 164 La. 913, 114 So. 834; Coleman v. Thibodaux, 119 La. 471, 44 So. 474. Such correction relates back, as between the parties, to the date of the original deed. Cf. Barret v. Hickman, La. App. 2 Cir., 3 So.2d 901, certiorari denied; 26 C.J.S. Deeds § 94, p. 854; 16 Am. Jur. Deeds Sec. 15, p. 591, Sec. 336, p. 629. Of course, as the above-cited jurisprudence specifically indicates, such deed may not be corrected to the prejudice of third persons. W. B. Thompson v. McNair, 199 La. 918, 7 So.2d 184.

Under the particular facts of the present case, we are unable to say that plaintiff can claim that his own title as a third person was prejudiced by execution of the 1912 correction deed. It was executed at an unsuspicious time prior to the acquisition by his own immediate vendors and long prior to his own acquisition. He was not, nor so far as the record shows were his immediate ancestors in title ever, in possession of the property described by the corrected deed. His own acquisitions specifically excepted whatever had been sold to Albert Phenis, which by the conveyance records through an unambigu-

ous corrected description (as we shall show shortly) could clearly be ascertained; and the property thus disclosed as excepted did not contravene or enlarge the terms of the exception clauses in plaintiff's chain of title.

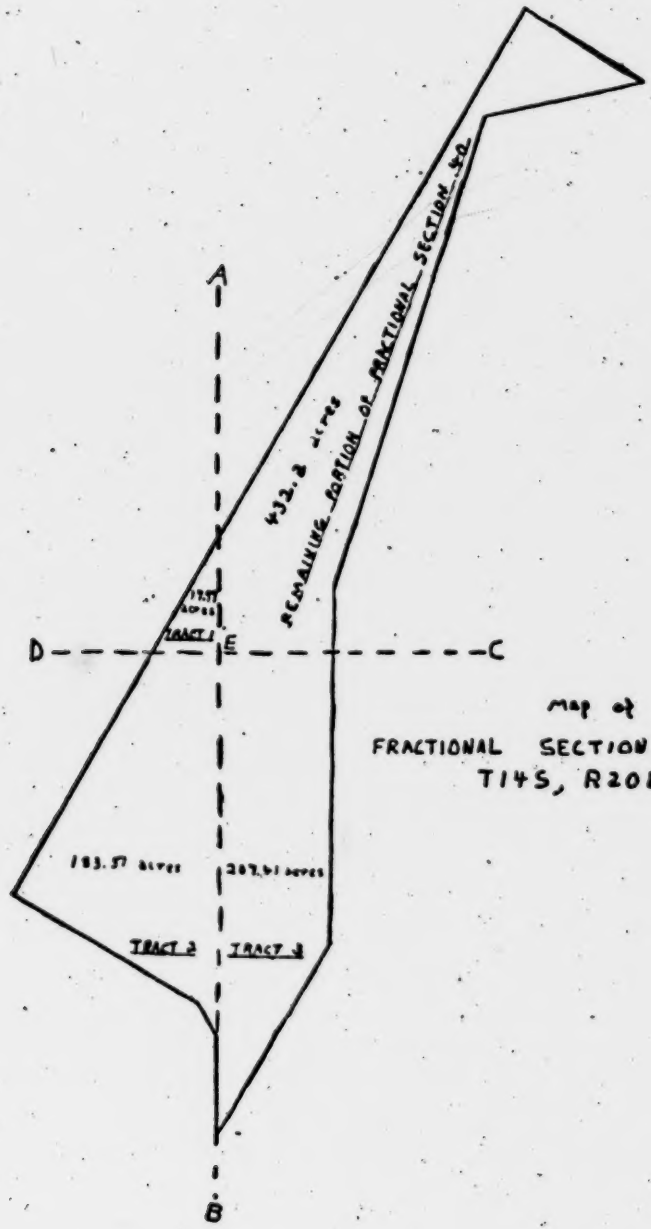
As stated earlier, the tract acquired by defendant by deed recorded in 1915, in so far as pertaining to land in Section 40, was described (in accordance with the corrected description by which Phenis acquired same) as follows: "That portion of lot or Fractional Section 40, lying west of THE SECTION LINE BETWEEN SECTIONS SEVEN (7) AND EIGHT (8) ABOVE, PRODUCED(7) and south of *a line drawn west from a point on the center line of the Morgan's Louisiana & Texas R. R. Co., said point being 600 feet north of the intersection of said railroad, with Bayou Saut D'Ours*(8) * * * and containing 442 acres, more or less(9) * * *." (Capitalization and italicization by this court.)

The following sketch depicts Section 40 and the lines used by the above description, as well as the tracts into which Section 40 is divided by these intersecting lines. (The acreage designations of the tracts into which Section 40 is divided by such lines were calculated by measurements made outside the conveyance records.) For convenience in discussion we will hereafter refer to such tracts and such lines by their designations on this sketch.

(7) The line described by the capitalization is shown on the sketch in the text as AB, and henceforth referred to as such. All surveyors agree that this line is located as shown.

(8) The line described by the italicized portion of the description is shown on the sketch in the text as CD. All surveyors likewise agree as to its location.

(9) The acreage designation refers also to land conveyed in Section 39, the decription of which—the omission indicated by the asterisks above—by clearly located lines is easily ascertainable and which is not claimed by plaintiffs herein. Actual measurements on the ground indicate that the portion of Section 39 conveyed comprised 32.56 acres.



map of
FRACTIONAL SECTION 40
T14S, R20E

We think the description indicated in defendant's deed is clear and unambiguous. The *only* portion of Section 40 which *is* west of the line described in the deed and depicted on the sketch as AB *and* south of the line described in the deed and depicted on the sketch as CD *is* Tract 2.

Further, the clear preponderance of the expert testimony by surveyors—two of whom testified for plaintiff and four of whom did so as experts for defendant—in the record supports this conclusion.

The expert surveyors testifying on behalf of plaintiff clearly and unequivocally testified to this effect. Their testimony that the lines described by the deed and depicted as B and CD should, in the absence of other direction by the deed, be projected as shown by the sketch (without terminating in the interior of Section 40 at, for example, point "E") is completely corroborated by all defendant's surveyors in so far as AB is concerned, and these latter witnesses assign no convincing reason why a similar principle should not be applied to CD. One of the surveyors employed as expert witnesses by defendant, when asked to describe unambiguously Tract 2 using the lines as bounds, did so identically (Tr. 1294) with the description used by defendant's correction deed.(10)

(10) Cf. also the self-styled unambiguous and very similar description of Tract 2 given upon a similar request by another of defendant's surveyors at Tr. 1154-55: "All that portion of Fractional Section 40 bounded on the west [east] by the Section line between Sections 7 and 8 above produced and bounded on the north by the projection of a line drawn from a point on the center line of the Morgan Louisiana and Texas R. R. Co., said point being 600 feet North of the intersection of said Railroad with Bayou Saut D'Ours." (Exhibit TX7C1) As this witness for defendant explained his description, "In other words, Tract Number (2) includes all of that part of fractional Section (40) which is bounded on the North by the above East-West line and which is bounded on the East by the above-described North-South line.". In attempting to describe unambiguously Tracts 1, 2, and 3 in terms of the lines

This expert witness for defendant, corrobrating testimony to this effect by plaintiff's witnesses, stated (Tr. 1282): "Wherever you have a description that is complete and intelligently describes the property, the 'acreage clause' is the weakest point of the description and would have no effect on the interpretation of that description." Testimony to the same effect was given by another of defendant's experts. (Tr. 1246.)

This preponderant expert opinion testimony is in accord with our settled jurisprudence that a sale by given bounds conveys only the property within such bounds, and that acreage designations appended to such specific descriptions do not enlarge or restrict the grant described by the specific bounds. Motichek v. Perriloux, 231 La. 849, 93 So2d 190; City of New Orleans v. Rathborne, 209 La. 93, 24 So. 2d 275; W. B. Thompson & Co. v. McNair, 199 La. 918, 7 So2d 184; Bender v. Chew, 129 La. 849, 56 So. 1023.

In view of this jurisprudence, inapplicable are cases from common-law jurisdictions holding the acreage designation indicative of the extent of the estate conveyed, see the annotation at 153 A.L.R. 4, entitled "Relief, by way of rescission or adjustment of purchase price, for mutual mistake as to quantity of land, where contract

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utilized in the original description, this witness supplied the following description: "All that portion of Fractional Sec. 40 lying west of the section line between Sec. 7 & 9 above produced, *together with that portion of Section 40 bounded on the west by said section line between Sect. 7 & 8 above produced and bounded on the north by* a line drawn west from a point on the centerline of the Morgan Louisiana and Texas R. R. Co., said point being 600 feet north of the intersection of said railroad with Bayou Saut D'Ours." (Exhibit 7X7A1; see Tr. 1144-1148.) The emphasized words indicate what it was necessary for the witness to add to the actual description by which defendant acquired the property in order that said description describes Tracts 1, 3, and 2, rather than merely Tract 2. (Tr. 1146-7.)

of sale fixes compensation at a specified rate per acre or other area unit," in suits between the parties to a sale at so much per measure, timely brought (cf. LSA-C.C. Art. 2498), by a buyer to secure a diminution of the price when the quantity is found to be less than stated. Cf. LSA—C.C. Arts 2492, 2494. [11] Cf., also, LSA—C.C. Arts. 854,[12] 2495; Comment, "The Obligation to Deliver in Sales of Land," 1 La.Law Review 608 (1939); Note, "Sales—Sales per Measure—Sales for a Lump Sum—Sales *per Aversionem*," 16 Tul.L. Rev. 641 (1942).[13]

The contention of defendant's surveyors that the description by which defendant acquired must be construed to contain Tracts 1, 2, and 3, in order to conform

(11) Under LSA-C.C. Arts. 2492 and 2494, assuming they might have been applicable in a suit between the parties to the original sale, the deficiency in the quantity of a sale at "so much per measure" "of a certain and limited body" does not result in a greater quantity being conveyed; the purchaser merely has the right, under certain conditions, to claim a diminution of the price, or the option to demand delivery, if practicable, of the deficiency.

(12) If any one sells or alienates a piece of land, from one fixed boundary to another fixed boundary, the purchaser takes all the land between such bounds, although it give him greater quantity of land than is called for in his title, and though the surplus exceed the twentieth part of the quantity mentioned in his title."

(13) This cited note concerns Fitzgerald v. Hyland, 199 La. 381, 6 So. 2d. 321, a suit between the parties to a contract to sell and buy certain real estate, wherein it is stated in summary of the Louisiana law applicable to such disputes, 6 So.2d 325: "In the absence of fraud or concealment, the rule established by the jurisprudence of this state is that, in sales where specific boundaries are given or where the sale includes property from one fixed boundary to another, the sale is per aversionem, and the seller conveys, and the buyer gets, all the property within the boundaries given, whether it be more or less than the measure mentioned in the contract, and that in sales where fixed boundaries are designated, such measurements and distances as may be mentioned in connection with the description must yield to the designated boundaries."

with the acreage designation is thus contrary to such jurisprudence.[14] In so far as defendant contends that the deed is ambiguous as designating the acreage conveyed thereby as "442 acres, more or less," whereas actual measurements of Tract 2 as described therein indicates that such tract conveyed contains only 183.51 acres, [15] this contention has the demerit of suggesting that a deed clear and unambiguous on its face may, by virtue of unrecorded and extrinsic evidence,[16] be converted into an ambiguous one. To the contrary, of course, extrinsic evidence to explain a deed may be resorted to only where the deed itself is ambiguous. Article 1945 of the LSA—Civil Code, see below.

Ultimately, defendant's arguments that plaintiff cannot prove title to any portion of the disputed tract depend upon an assumption that the description obtained from the conveyance records of the property excepted from plaintiff's acquisition as previously sold to defendant's ancestor in title is at least ambiguous, so that extrinsic evidence (Di Cristina v. Weiser, 215 La. 1115, 42 So. 2d 868), such as acreage evidence (Plaquemine Oil & Development Co. v. State, 208 La. 425, 23 So2d 171), or the alleged subsequent construction of the deed by the parties

(14) We likewise find to be unimpressive the suggestion that the description in the deed is of land clearly locatable as including all of the property in dispute (Tracts 1, 2, and 3) because certain surveyors went on the ground and did so locate it. The evidence indicates that such surveys were not made by an independent interpretation of this description but simply in response to directions to establish the predetermined lines.

(15) With the tract in Section 39 conveyed also by the description, which is measured at 32.56 acres, the actual acreage conveyed thus would be 215.07 acres, rather than "442 acres, more or less."

(16) That is, the surveys and measurements of quantity conveyed by bounds indicating a lesser quantity than designated.

(LSA—C.C. Art. 1956, Pendelton v. McFarlane, 222 La. 569, 63 So.2d 1) may furnish a guide to its interpretation.

But while the "courts are bound to give legal effect to all such contracts according to the true intent of all the parties," LSA—C.C. Art. 1945 (2), nevertheless, such "intent is to be determined by the words of the contract, when these are clear and explicit and lead to no absurd consequences." LSA—C.C. Art 1945 (3). See, e. g., Stack v. De Soto Properties, 221 La. 384, 59 So.2d 428, cf., Doiron v. O'Bryan, 218 La. 1069, 51 So.2d 628; Weber v. H. G. Hill Stores, Inc., 210 La. 977, 29 So.2d 33. We find the property excepted from plaintiff's title as previously conveyed to Phenis is clearly and unambiguously described by the corrected description in the title emanating from Phenis and now held by defendant. The extrinsic evidence offered over plaintiff's objection is thus inadmissible to prove that the deeds in defendant's chain of title conveyed other or more land than the property (Tract 2) therein unambiguously described.

In summary, the plaintiff's predecessors in title acquired all of Section 40, except that portion reflected by the conveyance records to have been sold to Albert Phenis, which we have determined to have included Tract 2, and only Tract 2.

Defendant's alternative plea of prescriptive title by ten years' possession under its 1915 acquisition deed, which was translative of title to the property therein described, LSA—C.C. Art. 3478, is of course limited to the property described in such deed, which we have held described and conveyed only Tract 2 of the land in controversy. Since we have already held that defendants acquired recorded title to Tract 2, it is unnecessary for us to pass upon this alternative plea.

Immediately before the argument on rehearing, the defendant-appellee Humble Oil and Refining Company in this court filed for the first time (under the apparent authority of LSA—C.C. Arts 3464, 3465, and Code of Practice Art. 902), a plea of prescription to plaintiff's demand for an accounting and the return of any minerals removed from any property of which plaintiff might be decreed the owner. This plea was specifically based only upon the one-year prescription of LSA—C.C. Arts. 3536-7 applicable to actions for offenses, quasi-offenses, and related actions and the three-year prescription of LSA—C.C. Art. 3538 applicable to suits upon accounts. Under these codal articles and the jurisprudence thereunder, the prescriptions pleaded are clearly not applicable to this petitory action by an owner to recover his property and the minerals produced therefrom.

For the reasons assigned, the judgment of the trial court is affirmed, in so far as it dismissed plaintiff's suit claiming title to Tract 2 as set forth on the plats and pleadings of this action, said Tract 2 being more particularly described as follows:

Tract No. 2: That portion of Fractional Section 40 lying West of the Section line between Section 7 and Section 8, produced, and South of a line drawn West from a point on the center line of the Southern Pacific Railroad track, said point being 600 feet North of the intersection of said Railroad track with Bayou Saut D'Ours, being in Township 14 South, Range 20 East, Southeastern Land District of Louisiana West of the Mississippi River, St. Charles Parish.

It is further ordered that the judgment of the trial court be and the same is hereby annulled, reversed and set aside, in so far as it dismissed plaintiff's claim to be recognized as the owner of Tracts 1 and 3, as described

by the plats and pleadings herein, and as more particularly described below in our decree; and

It is further ordered that there be judgment in favor of the estate of Jacques E .Blevins, appearing through the duly qualified and authorized testamentary executrix, recognizing it to be the true and lawful owner of and as such entitled to the immediate possession, with all right, title and interest, in and to the following described property:

Tract No. 1: That portion of Fractional Section 40 lying West of the Section line between Section 7 and Section 8, produced, and North of a line drawn West from a point on the center line of the Southern Pacific Railroad track, said point being 600 feet North of the intersection of said Railroad track with Bayou Saut D'Ours, being in Township 14 South, Range 20 East, Southeastern Land District of Louisiana, West of the Mississippi River, St. Charles Parish.

Tract No. 3: That portion of Fractional Section 40 lying East of the Section line between Section 7 and Section 8, produced, and South of a line drawn West from a point on the center line of the Southern Pacific Railroad track, said point being 600 feet North of the intersection of said Railroad track with Bayou Saut D'Ours, being in Township 14 South, Range 20 East, Southeastern Land District of Louisiana, West of the Mississippi River, St. Charles Parish.

It is further ordered that the Humble Oil and Refining Company release and relinquish its possession of the above described property to said owner thereof and that said Company render unto said owner a full accounting for any and all oil, gas, and other minerals which it may, at any time, have removed therefrom. It is further ordered that this cause be remanded to the lower court for

a proper adjudication of the rights of the parties plaintiff in accord with this decree.

All costs of this appeal are to be paid by the defendant-appellees.

Affirmed in part: reversed in part.

HAMITER, J., concurs in part and dissents in part.

McCALEB, J., dissents in part.

HAWTHORNE, J., concurs in the decree affirming the judgment of the lower court as to the land designated and described as Tract 2; and dissents from the holding of the court in all other respects.

HAMITER, Justice (concurring in part and dissenting in part).

For the written reasons which I assigned on the original hearing of this cause I agree that the suit should be dismissed as to tract No. 2. And for the same reasons I am of the opinion that plaintiff's demands should be rejected also as to tracts Nos. 1 and 3.

McCALEB, Justice (dissenting in part).

An analysis of the majority opinions in this case reveals but little difference of view in respect of the unique ruling that a purchaser of land described by lots or fractional sections, excepting therefrom certain land which had been previously sold to another, acquires a title not only to the land he bought and paid for but also to the acreage that he did not buy or pay for, in case the prior deed conveying the excepted property to the third party contains a vague or indefinite description of the land. Indeed, the only preciptable variation in the major premise of the first

opinion and this one is that the former completely ignored the fundamental principle that a plaintiff in a petitory action must recover upon the strentgth of his own title and not upon the weakness of that of the possessor, whereas this opinion, while giving recognition to that principle, fails to apply it and proceeds to decide the case on the weakness of the defendant's title.

This last opinion is assertedly predicated on certain basic principles applicable to the transfer of immovables in Louisiana, and it dwells at some length on the doctrine of registry. Yet, it is difficult to discern the connection between the doctrine of registry and plaintiff's title, or rather the lack thereof. How does registry of defendant's deed, or failure to register it, aid plaintiff in this petitory action to recover 408 of the 440 acres he did not buy? Registry cannot supply a title when there is none. However, the majority seems to feel that registry is of some assistance to plaintiff, it being professed that plaintiff is only bound by the description in the deeds to defendants and, since those deeds do not describe all of the excepted acreage, plaintiff is entitled to be recognized as the owner of all undiscribed portions of the acreage in defendant's possession even though he did not buy or pay for them.

Pursuing this line of thought, the majority indicate that failure to recognize plaintiff's title to the excepted property, when the conveyance records show that considerably less land was accurately described in the transfer to defendants than the acreage stated therein, would be violative of public policy in that it would allow defendants to enlarge their title by the admission of extrinsic evidence to show that they were delivered all of the land of which they admittedly are in possession.

This asserted fear of unreliablity of extrinsic evidence to prove title has no relation to this case. I re-

iterate that plaintiff must recover on his own title. There might be some basis for the deduction were this a case in which plaintiff was claiming that he did not get title to and possession of all of the property he bought and paid for. But, of course, that is not the situation here as the only property claimed by plaintiff is the property he neither bought nor paid for, i. e., the property that was excepted in the deed.

Unlike the original opinion, this one recognizes that defendants have a good title to 183.51 acres of the 440 acres of land of which they have had possession for many years and gives the balance of 215.41 acres to plaintiff. This result emanates from a finding that the description contained in the correction deed, under which defendants hold, is clear and unambiguous—and this, despite the fact that such a construction of the descriptive language in the deed gives defendants only 183.51 acres, whereas the acreage called for in the conveyance is 442 acres, more or less.

While I, of course, agree that the method of identifying land by acreage is the weakest known and yields to every other method (W. B. Thompson & Co. v. McNair, 199 La. 918, 7 So.2d 184), this does not mean that an acreage call is not entitled to be considered in appraising the other descriptive recitals. In this connection, it is to be observed that the land designated in defendants' title is not described by metes and bounds (a sale per aversionem); it is described as being all land west of a projected section line and south of another line drawn west from another point, which eastern point is particularly described, the total containing 442 acres, more or less. These recitals require interpretation, in my opinion, in order to ascertain the true intent of the parties, that is, whether the language describes the tract as including only that land which is west of the section line projected and which is also south of the

line drawn west from the designated point, as the majority finds to be the case, or whether it covers all land on the western side of the produced section line and all land south of the other line drawn west to the point at which it meets the section line, as contended by defendants.

In my view, the correctness of defendants' position is manifest, coinciding substantially as it does with the acreage call and all of the extrinsic evidence of the parties involved, plus possession in good faith of the 440 acres for over ten years.

On the other hand, the construction adopted by the majority leads, in my estimation, to absurd consequences for defendants are said to own less than one-half of the acreage set forth in the deed. It is a salutary principle of our law, stated in Article 1945 of the Civil Code, that legal agreements having the effect of law upon the parties, "none but the parties can abrogate or modify them". And upon this principle are established certain cardinal rules of construction, the third rule being that the intent of the parties is to be determined by the words of the contract "when these are clear and explicit and lead to no absurd consequences".

I would construe the description of the deed in question so as to give effect to all calls therein and thus carry out the true intent of the parties to convey and purchase 440 acres of land, more or less.

The judgment of the district court should be affirmed.

HAWTHORNE, Justice (concurring in part and dissenting in part).

I concur in the decree on rehearing insofar as it dismisses plaintiff's suit as to Tract 2. I dissent from the holding of the majority of the court in all other respects for the legal reasons assigned in my dissent to the original opinion, and I am in full accord with the legal principles on which the dissent of Justice McCALEB on rehearing is based.

As just stated, I have not changed my position in regard to the principles of law upon which I founded my dissent on first hearing. I note, however, that there appears to be some ambiguity in my statement of facts dealing with acts of possession by the defendant, and I take this opportunity to clear up that ambiguity.

The 1,000-acre tract referred to in my dissent on first hearing consisted of 442 acres conveyed to Phenis by Dusenbury and 552 acres conveyed to Phenis by Louisiana Meadows Company, Ltd., Both of these tracts were subsequently acquired by defendant Manufacturers Record Publishing Company and leased by it to Humble Oil & Refining Company. Trapping leases, sales of timber, and other acts of possession mentioned in my original dissent had reference to the 1,000 acres. For instance, the 11 wells drilled by Humble were on the 1,000-acre tract; only 2 of these wells were drilled on the 408 acres in controversy in this suit, and they were on the tracts designated as Tracts 1 and 3.

FOURNET, Chief Justice (concurring).

I fully concur in the views expressed by the majority. However, when such diversity of opinion exists with respect to property having the great value of that involved in this case, lending an illusion of merit to the criticism that has been voiced by some of the interested parties, because of my concern for the integrity and the stability of the jurisprudence, I felt it my duty to read

the entire record, to make a careful study and analysis of the evidence and the law applicable thereto, and, in order to make clear what might be otherwise confusing to those who will hereafter study this case, to record my findings.

While the record is voluminous—consisting of 8 volumes totalling 1892 pages, with at least another thousand pages to be found in the some 350 exhibits introduced(1)—the facts are very simple. They may be succinctly stated to be that both the plaintiff and the defendants trace their title to a common author—Allan T. Dusenbury(2)—who, at a tax sale in 1908, acquired Sections 38 and 40 in T. 14 S., R. 20 E., and subsequently, by instrument dated March 9, 1910, sought to convey to Albert Phenis 442 acres

(1) The major portion of the evidence in the record proved to be wholly unnecessary and irrevelant for a decision in this case. Much of it was devoted to an attempt to establish title by possession of 30 years, which proved to be futile and was abandoned. A large part of the remainder was introduced by defendants, over plaintiff's objection, in an effort to establish their title to Tracts Nos. 1, 2, and 3 by showing the intention of the parties through oral explanation of the deed of 1910, although there was of record an instrument executed by these same parties in 1912 in which that intention was spelled out in clear and unambiguous language.

(2) Dusenbury was, at the time, the treasurer of the Truck Farm Land Company. This company had, in 1906, acquired from O. W. Crawford, along with other property "A certain plantation known as the 'Vacherie' plantation, composed of sections 39 N. and E. of Bayou Saut D'Ours, also all of Secs. 38 and 40 in T. 14 S. R. 30 E." Sections 38 and 40 were conveyed to Dusenbury by the sheriff pursuant to a sale provoked to pay the unpaid taxes of 1907 assessed in the name of the Truck Farm Land Company, and, in a document executed on May 27, 1940, Dusenbury stated he "actually purchased said property for and of behalf of the Truck Farm Land Company, Ltd. in his capacity as treasurer of said corporation." It is to be noted that under this tax deed Dusenbury actually acquired no title whatsoever to any property in Section 39.

in Sections 39 and 40.,[3] joining, on December 15, 1910, the Truck Farm Land Company,[4] in transferring to the Louisiana Farm Land Company some 14,967 acres, including ALL of Sections 39 and 40 except certain specified lots described in accordance with a plan of survey of the village of Paradis, Louisiana, that are not involved here, and, also, "approximately 440 acres previously sold to Albert Phenis," under the deed of March 9, 1910.

It is obvious, therefore, that the plaintiff, who deraigns his title from the Louisiana Farm Land Company, established his ownership under the deed of December 15, 1910, to all of Section 40 except that portion previously conveyed to Phenis by the deed of March 9, 1910. The decision in the case therefore resolves itself into a determination of what land in Section 40 is identifiable under the description contained in the March 9, 1910, deed[5] as being thereby transferred to Phenis. If this description

(3) The land sought to be conveyed by this deed is described therein as follows: "That portion of lot or Fractitonal section 40 lying West of the section line between sections seven (7) and Eight(8) above produced, and a line drawn West from a point on the center line of the Morgan Louisiana and Texas R. R. Co., said point being 600 feet North of the intersection of said Railroad with Bayou Saut D'Ours." (The description of the land in Section 39 is not included inasmuch as it is not involved in this litigation.)

(4) In the deed it is stated that Dusenbury was appearing for the purpose of renouncing, abandoning, relinquishing, transferring and assigning to the Louisiana Farm Land Company "all right, title, and interest which he has, or may have, to any and all of the lands herein conveyed and described." Another party to the deed was the Louisiana Meadows Company, conveying other property which it owned and which is not included in this litigation. Edward Wisner was the president of both the Truck Farm Land Company and the Louisiana Meadows Company and signed the deed as such. The present plaintiff secured his interest in the property in Section 40 through Wisner.

(5) This description is set out in Footnote No. 2, supra.

sufficiently operates to transfer a right to any identifiable portion of the property in Section 40, the plaintiff's suit, to this extent, must fail..

It is apt to observe that although the deed of March 9, 1910, purports to convey some 442 acres "more or less" in Sections 39 and 40, there is nothing in the deed itself from which it can be determined just how much of this acreage was located in Section 39 and how much was located in Section 40. Furthermore Dusenbury not only had no title to any portion of Section 39, but the description of the land purportedly conveyed in Section 40 is so uncontrovertibly defective it is impossible for anyone reading that description as written to extend the calls therein set out and locate the land on the ground, and one ever has, for these calls, when followed, do not as the experts express it, make a "firm description" of any property whatsoever. This was very ably demonstrated in our original majority opinion and requires no further emphasis here.

Actually, Allan T. Dusenbury, who drew up the 1910 deed and prided himself with being a civil engineer, denied he had signed the instrument as recorded, implying a clerk in the recording of the same omitted essential words.(6) He was so emphatic about the defectiveness of

(6) On the witness stand Dusenbury insisted the essential words omitted from the description, so far as Section 40 is concerned, were "south of," which should have been inserted between the words "and" and "a" following the phrase "above, produced" (Tr. 1423), so that the description would read thusly: "That portion of lot or Franctional Section 40 lying West of the section line between sections seven (7) and Eight (8) above, produced, and *south of* a line drawn West from a point on the center line" of the railroad. The italicized words are those Dusenbury considered sufficient to describe the property in Section 40 he intended to convey to Phenis by the 1910 deed.

the description in the 1910 deed he said: "* * * my self respect would not allow me to say that I signed such an instrument as that recorded instrument is." (Tr. 1307-08.) Commenting further, he said that "no one but a nitwit would not know that an error was made" (Tr. 1435) and that "common sense would not allow even a 'half-wit' to make errors like that."(7) (Tr. 1431.)

Accordingly to Dusenbury, apparently the only living party to the deed of March 9, 1910, "Albert Phenis or somebody connected with his outfit discovered the error that had been made in describing it, and asked to have the correction deed issued; which was about two (2) years after the original deed was executed" (Tr. 1423), explaining, further, that Phenis, in telling him the description as recorded was not correct, stated it

(7) A month and a half after executing the deed of March 9, 1910, Phenis, by deed of April 21, 1910, conveyed the land he purportedly acquired in Section 40 to Ray C. Power, using the IDENTICAL description contained in the March 9, 1910, deed as it appears on the public records, although that deed of March 9, 1910, was not actually recorded until July 13, 1910, several months later. It is obvious, therefore, that the original deed of March 9, 1910, could ALONE have been used as the basis for supplying the description carried forward into the Phenis-Power deed, and that it, therefore, contained the identical faulty description to be found in the March 9 deed as recorded, Dusenbury's protestations to the contrary notwithstanding. (The original deed was never produced, and it was stated by the defendants it had been lost or misplaced.) Furthermore, even had there been an omission of the words "south of," from the description of the land conveyed in Section 40, this recordation was the only instrument on the public records that limited the acreage in Section 40 that Louisiana Farm Land Company acquired under its deed of December 15, 1910, and that was, therefore, binding on the company. That recordation described no identifiable land whatsoever; consequently, there was no legal limitation on the acreage in Section 40 acquired by the company under its 1910 deed of December 15.

"had been brought to his attention, I think by his home office;[8] and he asked me, or somebody in my office, to have a correction deed made" (Tr. 1434) "conveying to him *the land that was intended to be conveyed* to him in CLEAR terms" (Tr. 1434), and he, accordingly, drew up the instrument termed "Correction of Title by A. T. Dusenbury to Albert Phenis" that was executed on April 18, 1912. (The emphasis on the word "clear" appears thusly in the record: all other emphasis has been supplied by me.)

The language used in this correction instrument to describe the property Dusenbury and Phenis *INTENLED* to convey[9] is so clear and unambiguous that when the lines

(8) It would appear the error in the description of the property was first noted by Ray C. Power, who went to Phenis for a correction, as these parties, on March 16, 1912, executed what is termed a "Correction of Title by Albert Phenis to Ray C. Power," wherein the words "south of" are added to the description of the land in Section 40, and the word "line" is substituted for the word "land" in the description of the land in Section 39, exactly as was done later in the Dusebury-Phenis correction instrument. In this instrument Phenis and Power recognized that "an error was made in the description of said lands," and the parish clerk was authorized to note the correction "in the margin of the Book and folio wherein the original deed of sale waa registered so that the property may be correctly and perfectly described." It was not until more than a month later that Phenis went to Dusenbury (apparently because recordation of the correction instrument without the approval of Dusenbury was refused by the officials) for the correction of their deed by the document of April 18, 1912. Dusenbury stated that both of these correction instruments were taken to St. Charles Parish by Phenis, where they were recorded on April 26, 1912.

(9) This corrected description, in so far as Section 40 is concerned, reads: "That portion of lot or fractional section 40 lying west of the section line between sections seven and eight above produced and *south of* a line drawn west from a point on the center line of the Morgan's Louisiana and Texas Railroad Co., said point being 600 feet north of the intersection of said railroad, with Bayou

are produced according to the calls the deed sets out a "firm description" that unquestionably describes only Tract No. 2 on the plat in the original majority opinion. The fact that Tract No. 2 contains only about 183.51 acres while the deed as corrected states the property thereby being conveyed contains "442 acres more or less" is immaterial, for, as testified by J. C. De Armas, Jr., one of the two independent experts introduced by defendants, "Wherever you have a description that is complete and intelligently describes the property, the 'acreage clause' is the weakest point of that description and would have no effect on the interpretation of that description"(10)

Saut D'Ours * * *." It is obvious that the only change made in the description was the addition of the italicized portion. This is the only addition that Dusenbury, who drafted both the original and the corrected instruments, insisted, even up to and during the trial of this case, was all that was needed to describe *just exactly the land he intended to convey* to Phenis and that Phenis intended to purchase.

(10) This testimony corroborates fully the two experts testifying on behalf of the plaintiff (Guy Seghers and Earl M. Collier), as well as another of the defense experts, O. E. Young. The main defense witness, Jack S. Tolor—who admittedly was instructed by his superiors in the Humble Oil and Refining Company to confirm a survey made by J. M. Nichols and prepare himself to testify in behalf of Humble in the suit then in progress—although acknowledging that without the acreage call he could not locate any property whatsoever in Section 40 under the description in the 1910 deed, took a view contrary to that of the defense witnesses De Armas and Young, i.e., he stated the acreage call was the all important consideration in the deed. He therefore sought by manipulating a number of tracts he carved from Section 40 to locate some combination of them that would total 442 acres, and, once that combination was ascertained, concluded this was the acreage intended to be conveyed by the 1910 deed. The only other expert testifying on behalf of the defendant (Fred N. Shutt) sought to uphold throughout the views of Toler, whom he followed on the stand and whose testimony he had just heard. The testimony of Toler and Shutts is not impressive. It is not only contrary to the defendants' other two experts — De Armas and Young—

(Tr. 1282); further, "that the acreage would be predicated wholly on the result of the survey of that area" (Tr. 1291-92), that is, a survey made under the description contained in the deed. This is in accord with our jurisprudence.

The defendants obviously realizing that the 1910 deed as corrected in 1912 was translative of title to Tract No. 2 only, endeavored to skip over this link in their chain of title and sought, throughout, to base their claim to the entire acreage involved in this litigation (Tracts 1, 2, and 3) on the instrument of March 9, 1910, alone, contending that inasmuch as the description therein was ambiguous, they should be permitted to show and to locate by extrinsic evidence the land intended to be conveyed by Dusenbury and Phenis at the time it was drawn and executed.

If such evidence was admissible under this theory, clearly the best evidence of the intention of these parties was the interpretation they themselves gave the 1910 instrument in the correction document executed by them on April 18, 1912 and in which they acknowledged before a notary public that the land intended to be conveyed by the deed of March 9, 1910, was erroneously described, and that it was their desire "by these presents to correct the said error and place the title as far as said correction is concerned of proper record." They also declared "that the true and correction (correct) description of said property" was as therein stated,(11) and, further, that they "hereby authorize and require the Clerk of Court and ex-

and that of the plaintiff's two experts—Segher and Collier, but, like Young's testimony, it is contradictory in many material aspects and, in other aspects, Toler and Shutts contradict each other. Additionally, Shutts admitted he knew nothing about the property except what he had been told in a conference with Toler and defense counsel.

(11) This description is given supra in Footnote No. 8.

officio Recorder in and for the Parish of St. Charles, to note this correction in the margin of Conveyance book * * * wherein the original deed was formerly registered so that property may be *correctly and perfectly* described." The parties themselves by this deed thus wiped out of existence the description in the March 9, 1910 deed and substituted therefor the description as set out in the 1912 instrument,[12] and they so declared to the world by their public recordation of it. (The emphasis has been supplied by me.)

However, in my opinion, it is immaterial for a decision in this case whether the deed of 1910 is totally defective, i. e., not translative of title to any portion of Section 40, as contended by the plaintiff, or, as contended by the defendants, only ambiguous, entitling them to prove by extrinsic evidence the actual land intended to be conveyed, for, as pointed out by the author of the majority opinion on rehearing, in the several transfers made of the property prior to the plaintiff's acquisition thereof, there is a specific reference to the fact that there is excepted from the sale of the property in Section 40 that portion previously sold to Phenis. Several of the transfers containing this exception occurred after the execution and recordation of the correction instrument of 1912, and under our law of registry, the plaintiff was bound by these instruments.

By the same token, the defendants were likewise bound by these instruments, and they cannot, therefore.

(12) Such a notation appears not only on the margin opposite the 1910 Dusenbury-Phenis deed as recorded, but also on the margin of the 1910 Phenis-Power deed as recorded. The notation is not dated, and the handwriting was not identified during the trial, but the present clerk of court testified the notation was not in the usual form officially employed by the recordation officials, though both instruments directed those officials to make such a notation on both original recordings.

assert title to any land in Section 40 that is not conveyed to them under the March 9, 1910, deed as corrected in 1912. It necessarily follows that when Manufacturers' Record acquired its interest direct from Power (a party to this correction deed) on July 23, 1915 (some three years after the correction deed was executed), and under the IDENTICAL language used in the 1912 instrument, it acquired in Section 40 only that property therein specifically described, which is Tract No. 2. It could not, thereafter, convey a greater right to its mineral lessee, the Humble Oil and Refining Company, or to those who acquired through either one or both of these companies, particularly when the Humble lease, granted in 1938, is, according to its very terms, limited to that portion of Section 40 described in the 1912 correction instrument, which is Tract No. 2.

JUDGMENT

29th JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES
STATE OF LOUISIANA

No. 4304

JACQUES E. BLEVINS

vs.

MANUFACTURERS RECORD PUBLISHING COMPANY

Filed: March 6, 1957

This is a petitory action to establish a ten-year prescriptive title to an irregularly shaped tract of land, comprising 408 acres, situated in Section 40, Township 14 S, Range 20 East, St. Charles Parish, Louisiana, filed on April 27, 1953. Plaintiff bases his alleged prescriptive title upon an act dated September 10, 1906, from one Ortman W. Crawford to Truck Farm Land Co., Ltd., and successive transfers of title set forth in his petition. Defendants trace their title through a deed dated March 9, 1910, wherein their ancestor in title, one Albert Phenis, acquired from one A. T. Dusenbury by act under private signature.

On July 25, 1908, entire Section 40, Township 14 South, Range 20 East, assessed to Truck Farm Land Company, Ltd., was adjudicated to Allan T. Dusenbury for unpaid taxes for the year 1907, said adjudication having been confirmed by tax deed dated July 31, 1908.

This tax adjudication has remained unchallenged of record since the date of its recordation until the filing of this suit on April 27, 1953. Plaintiff expressly alleges the nullity of said tax sale in Paragraph #2 Sub-paragraph (b), of his petition and sought to introduce evidence in support of his contention which evidence was ruled inadmissible, insofar as the effect of such evidence was offered for the purpose of affecting third parties who had previously acquired rights relying upon the faith of the recorded tax deed.

The deed from A. T. Dusenbury to Albert Phenis covered 442 acres of land in Sections 39 and 40, the 408 acres located in Section 40 being the subject of this lawsuit. The uncontradicted evidence discloses that this entire 408 acres is marsh land not subject to cultivation and until the discovery of oil more than ten years prior to the filing of this suit, having no value save for the trapping of wild animals. The remainder of the acreage included in the deed is contiguous to the 408 acre tract on the east and forms part of Section 39, most of which is high land on which was located merchantable timber in 1908.

The 442 acre Albert Phenis tract is described in the deed of March 9, 1910, as follows:

> That portion of lot or Fractional Section 40 lying West of the section line between sections seven (7) and eight (8) above, produced and a line drawn west from a point on the center line of the Morgan Louisiana and Texas R. R. Co. said point being 600 feet north of the intersection of said railroad with Bayou Saut D'Ours and that portion of lot

or Section Thirty-nine (39) bounded on the north by the above described land on the east by the right of way of the said Morgan Louisiana & Texas R. R., on the south by Bayou Saut D'Ours and on the west by Section Forty (40), all being in T. 14 S. R. 20 E., South Eastern Land District of Louisiana, west of the Mississippi River and containing Four Hundred and Forty-two (442) acres more or less.

It is expressly understood and agreed by and between both parties to this sale that if at any time a deficiency of acreage shall be found it shall be made good by said vendor.

The same parties to this deed executed another instrument on April 18, 1912, in which the foregoing description was characterized as being "partly incorrect" and the "true and correction description" was given as:

That portion of lot or fractional section 40 lying west of the section line between sections seven and eight above, produced and south of a line drawn west from a point on the center line of the Morgan's Louisiana and Texas Railroad Co., said point being 600 feet north of the intersection of said railroad, with Bayou Saut D'Ours and that portion of lot or section Thirty-nine (39) bounded on the north by the above described line, on the east by the right of way of the Morgan's Louisiana and Texas R. R. on the south by Bayou Saut D'Ours, and on the west by section 40 all in T. 14 S. R. 20 East, Southeastern Land District of Louisiana, west of the Mississippi River, and containing Four Hundred and Forty-two (442) acres, more or less. The description of said property otherwise being correct.

Each deed contained in plaintiff's chain of title subsequent in date to March 9, 1910, expressly excepts the 442 acres previously sold to Albert Phenis. This is evident by recitals contained in the deeds annexed to plaintiff's petition, on which he bases his ten-year prescriptive title.

Plaintiff's claim of title is predicated upon the alleged insufficiency of the descriptions contained in the above deeds dated respectively, March 9, 1910 and April 18, 1912.

In presenting his case for a prescriptive title, plaintiff called no witnesses in support of his allegation of possession, merely offering various documents which either recited or implied possession by various persons or corporations under whom or which he claimed. By contrast, defendants called a series of witnesses who testified to the exercise of possession in behalf of defendants over a period of many years; commencing with a record of eviction proceedings against one Adam Sumler from the high land located in Section 39 in 1916, defendants offered testimony as to the survey of the disputed property in 1923 (Dusenbury), the sale of timber and cutting operations by E. P. Brady, through his Iona Tie & Timber Co., in 1923-24 (Branch and Green), the leasing of the property for trapping to and trapping operations by this same Brady in 1929-31 (Ritchie), the leasing of the property for trapping to and trapping operations by Felix Dufrene in 1934 and each year thereafter (Dufrene) and geophysical exploration in 1938 and mineral development beginning in 1942, (Morgan, Chesney).

Defendants offered in evidence proof of payment of taxes on the 442-acre tract from date of purchase to the date of trial. Defendants also offered the testimony of several surveyors as to the sufficiency of the description of the two Dusenbury-Phenis deed by the use of competent evidence, such as was in the record (Shutts, de-Armas, Young, Toler and Ritchie). By way of rebuttal, plaintiff called two surveyors who expressed the opinion that the descriptions in question were insufficient to permit location of the property (Seghers and Collier).

Defendants' witnesses, Morgan and Chesney, employees of defendant, Humble, testified with respect to Humble's oil operations covering a period in excess of ten years prior to the filing of this suit. Humble's possession, development operations and production of oil from the 408-acre tract is not disputed. In Paragraph #54 of his petition, plaintiff alleges:

> "That from and since June 16, 1943, no action of any kind has been taken for the development of petitioner's said property,"

having previously alleged the drilling by Humble and the operation of oil wells on the 408-acre tract in Paragraph #53 of his petition. All of the defendants' other witnesses as to possession were outside with no interest in the outcome of the suit. The Court is personally acquainted with these witnesses or knows them by reputation and is satisifed, first, as to the truth of their testimony, and, second, that such testimony outweighs the recitals of plaintiff's documentary proof.

The Court, accordingly, finds as a fact that defendant, Manufacturers Record, possessed the disputed property as owner by evicting Adam Sumler in 1916, by inspection and survey through its agent, A. T. Dusenbury, in 1923, by the sale of timber to and the cutting of timber by its vendee, Iona Tie and Timber Company, in 1929-30-31, by the trapping activities of its lessee, Felix Dufrene, from 1934 to the present time and by mineral exploration and development of its lessee, Humble from 1938 to date. All of these facts constituted possession which was "continuous and uninterrupted, peaceable, public and unequivocal," as provided in *Article 3487 of the Civil Code*, and the Court finds as a fact that defendants did exercise possession of this nature during the times covered by the testimony.

From a careful hearing of the expert testimony and observation of the witnesses on direct and cross-examination, the Court concludes that the evidence in favor of the sufficiency of the descriptions by use of competent evidence is clear and convincing. In addition, the Court finds it difficult, if not impossible, to reconcile the inability of plaintiff's expert witnesses to locate the disputed property with the total absence of any testimony that any one of the numerous persons shown by the record as having dealt with the property in question experienced any difficulty whatever in locating the 440-acre Albert Phenis tract. On the contrary, the record is replete with testimony of witnesses who experienced no difficulty whatever in locating and exercising the rights acquired on the Albert Phenis 440-acre tract of land.

Plaintiff's alternative plea, based on the deeds referred to in Paragraphs 16, et seq., of his petition is fatally defective, in that the assignments to him from Wisner Estates and from Louisiana Land & Exploration Company are subject to suspensive conditions which still continue in full force and effect. The language in which these conditions are expressed indicates a clear intention that the assignments shall not be used as a basis for asserting title to the property in question, unless and until legal title to the 408-acre tract be legally established in Wisner Estates or Louisiana Land & Exploration Company. The Court is of the opinion that none of the instruments offered by plaintiff to show that title was previously established do so and that, accordingly, the suspensive conditions effectively bar the use of these instruments to establish plaintiff's title. In addition, two letters from plaintiff written in 1939 were offered in evidence in which he offered to buy an interest in defendants' property made up of the property herein at issue and other property contiguous thereto. The Court is of the opinion that these suspensive conditions and this recognition of defendants' title effectively create an estoppel against any claim of title by plaintiff.

It is axionatic that, in a petitory action, a plaintiff must prevail upon the strength of his own title and not upon any weakness in the defendants' title.

The Court Finds:

First, that plaintiff has failed to establish a ten-year acquisitive prescriptive title to the property involved in this controversy.

Second, that, the description contained in the deed of March 9, 1910, from A. T. Dusenbury to Albert Phenis is sufficient to identify the 442 acres therein described.

Third, that the description contained in the deed of April 18, 1912, is ample and sufficient to identify the 442 acres therein described, and

Fourth, that defendants have established possession of the 442-acre Albert Phenis tract from the date of expulsion of the tenant Adam Sumler in 1916 to the present time.

Based on the foregoing, the Court finds that defendants have established ownership to the property involved in this controversy.

And therefore, for the reasons above assigned,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants and against the plaintiff, his heirs and assigns, dismissing his suit and rejecting his demand, with costs, and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the fee of James P. Vial, Curator ad Hoc be and the same is hereby fixed at the sum of Two Hundred Fifty and 00/100 ($250.00) Dollars to be taxed as costs.

JUDGMENT READ, RENDERED AND SIGNED in open Court on this 6th day of March, 1957.

(SGD.) L. ROBERT RIVARDE,

JUDGE

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 475

MANUFACTURERS RECORD PUBLISHING COMPANY,

Petitioner,

versus

MARGARET E. LAUER, the duly qualified and authorized Testamentary Executrix of the Succession of Jacques E. Blevins, LOUIS J. ROUSSEL and REPUBLIC PETROLEUM CORPORATION,

Respondents.

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 475

MANUFACTURERS RECORD PUBLISHING COMPANY,

Petitioner,

versus

MARGARET E. LAUER, the duly qualified and authorized Testamentary Executrix of the Succession of Jacques E. Blevins, LOUIS J. ROUSSEL and REPUBLIC PETROLEUM CORPORATION,

Respondents.

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Margaret E. Lauer, Testamentary Executrix, Louis J. Roussel, and Republic Petroleum Corporation respectfully request this Court to deny the application for a writ of certiorari to the United States Court of Appeal for the Fifth Circuit to review the judgment of that Court entered on June 29, 1959.

OPINIONS BELOW.

The judgments of the Supreme Court of Louisiana which are sought to be reviewed in the federal court proceedings are entitled *Jacques E. Blevins v. Manufacturers Record Publishing Company, et al.*, No. 43,469 on the docket of the Louisiana Supreme Court. The original opinion and decree was rendered on November 12, 1957, and the opinion and decree on rehearing was rendered on May 26, 1958. These opinions are reported in 105 So. (2d) 392.

The opinion of the United States Court of Appeals for the Fifth Circuit that is sought to be reviewed on certiorari is reported in 268 Fed. (2d) 187.

JURISDICTION.

The petitioner asserts jurisdiction under 28 U. S. C. 1254 (1). Respondents deny jurisdiction to review this case by certiorari on the grounds that:

1. (a) Petitioner's failure to timely apply to this Court by appeal from, or certiorari directed to, the Louisiana Supreme Court to review the opinions and decree of that Court within ninety (90) days from the final rendition of same on May 26, 1958, is an effective bar to federal court review. *Angel v. Bullington*, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947); *Rooker v. Fidelity Trust Co.*, 263 U. S. 413, 44 S. Ct. 149, 68 L. Ed. 263 (1923).

(b) Failure of petitioner to timely raise in the State Court proceedings the federal questions now urged is sufficient basis for denial of writ of certiorari. *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649,

62 S. Ct. 857, 86 L. Ed. 1090 (1942); *McGarrity v. Delaware River Bridge Commission, et al.*, 292 U. S. 19, 54 S. Ct. 565, 78 L. Ed. 1095 (1934).

2. (a) In a diversity action the Federal Courts are bound by the laws of the state. *Erie Railway Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

(b) The Louisiana State Courts do not have jurisdiction to annul a decree of the Louisiana Supreme Court. *Dulien Steel Products, Inc., v. Connell*, 252 F. (2d) 556 (5th C. C. A. 1958), certiorari denied, 356 U. S. 968, 78 S. Ct. 1008, 2 L. Ed. (2d) 1074.

(c) Therefore, the Federal District Courts cannot grant relief where the right to recover cannot be asserted in the State Courts. *Guaranty Trust Company of New York v. York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945).

(d) This Court ordinarily accepts the interpretation of local law by the Court of Appeals. *Propper v. Clark*, 337 U. S. 472, 69 S. Ct. 1333, 93 L. Ed. 1480 (1949).

3. (a) This is a diversity action filed in the United States District Court to **enjoin** the enforcement of a final decree of the Louisiana Supreme Court, and by amended pleadings, to have the judgment of the Louisiana Supreme Court declared null and void. It is unquestioned that the State Court had jurisdiction of the parties, as well as the subject matter of the controversy, that pleadings were filed by all parties, all parties were represented

by counsel, the case was tried and argued, petitioner herein and its co-defendants in the State Court proceedings were the successful litigants before the trial court and, thereafter, the case was reviewed by appeal to the proper State appellate court, the Louisiana Supreme Court. Under such circumstances the prohibition against injunctive relief contained in 28 U. S. C. 2283 is fundamental and the United States District Court properly refused to entertain jurisdiction of such complaint. *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, 348 U. S. 511, 75 S. Ct. 452, 99 L. Ed. 600 (1955).

(b) The supplemental prayer for a declaratory judgment did not serve to vest, of itself, the United States District Court with jurisdiction. *Skelly Oil Co. v. Phillips Co.*, 339 U. S. 667, 70 S. Ct. 876, 94 L. Ed. 1194 (1950); *Alabama State Federation of Labor, Local Union No. 103, United Brotherhood of Carpenters and Joiners of America, et al., v. McAdory, County Solicitor, et al.*, 325 U. S. 450, 65 S. Ct. 1384, 89 L. Ed. 1725 (1945).

4. (a) The claim of petitioner of any violation or deprivation of constitutional rights, either State or Federal, are illusory and are not supported by the record.

(b) Jurisdiction to review by certiorari should be granted only in cases of general importance, in cases affecting relations with foreign governments, or to secure uniformity of decisions. *Forsyth v. City of Hammond, et al.*, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095 (1897); *Houston Oil*

Co. v. Goodrich, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385 (1918).

(c) A decision of a State Supreme Court, even if erroneous, does not deprive the unsuccessful party of his property without due process within the meaning of the Fourteenth Amendment of the Federal Constitution. *Bonner v. Gorman*, 213 U. S. 86, 29 S. Ct. 483, 53 L. Ed. 709 (1909); *Worcester County Trust Co. v. Riley*, 302 U. S. 292, 58 S. Ct. 185, 82 L. Ed. 268 (1937).

(d) A federal question or infringement of constitutional right must have a substantial foundation and not depend solely upon unsupported averments. *Lynch, et al., State Tax Com'rs of New York v. People of New York, ex rel. Pierson*, 293 U. S. 52, 55 S. Ct. 16 (1934); *Buck, et al., v. People of State of California*, 343 U. S. 99, 72 S. Ct. 502 (1952); *City of New Orleans, et al., v. New Orleans Water Works Co., et al.*, 142 U. S. 79, 12 S. Ct. 142 (1891).

(e) A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and should be granted only where there are special and important reasons therefor. Rule 19, Supreme Court Rules; *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

STATEMENT OF THE CASE.

This action was instituted by petitioner, one of approximately fifty unsuccessful litigants in the State

Courts of Louisiana, to enjoin the execution of a judgment of the Louisiana Supreme Court, which judgment had already been executed at the time that the Federal action was filed on October 14, 1958. By supplemental pleadings, petitioner sought a declaratory judgment, but the application for a declaratory judgment does not raise any new question and does not seek any relief that is not readily available under the application for injunctive relief.

The declared purpose of the action in the United States District Court was to enjoin the three respondents from further executing a final judgment which was rendered by the Louisiana Supreme Court in the proceedings entitled *Jacques E. Blevins v. Manufacturers Record Publishing Company, et al.*, No. 43,469 on the docket of that Court. The original opinion and judgment of the Louisiana Supreme Court was rendered on November 12, 1957, and the opinion and judgment on rehearing was rendered on May 26, 1958. The opinions of the Louisiana Supreme Court on original hearing and on rehearing are reported in 105 S. (2d) 392, *et seq.*

The three respondents filed a motion to dismiss the complaint on the dual grounds that the United States District Court did not have original jurisdiction to entertain the suit, and, further, that the complaint failed to state a claim against the defendants upon which relief may be granted. (Tr. 48.)

The respondents also filed a response to the application for a preliminary injunction which response, among other things, set forth that the judgment of the Louisiana

Supreme Court in Suit No. 43,469 was made executory by judgment rendered and signed on June 9, 1958, in the 29th Judicial District Court for the Parish of St. Charles, State of Louisiana, at which time the Humble Oil and Refining Company, the mineral lessee of (and co-defendant in the State Court proceedings with) Manufacturers Record Publishing Company, the present sole petitioner, delivered the actual physical possession of the land in question to Louis J. Roussel and Republic Petroleum Corporation, mineral lessees of Wisner Estates, Inc., predecessor in title to Jacques E. Blevins. (Tr. 49-53.) This response further set forth that the well on these lands has been in the exclusive possession and under the exclusive control of respondent, Republic Petroleum Corporation, since July 18, 1958, and further, that Humble Oil and Refining Company had paid to the respondents $1,381,512.34 as a tentative accounting for oil and gas production attributable to the lands to which title had been adjudged by the Louisiana Supreme Court to be in the Succession of Jacques E. Blevins. All of these events and acts occurred three to four months before this action was filed in the Federal Court.

Upon these issues the motion to dismiss and application for a preliminary injunction were heard by the District Court, and documentary evidence was submitted on behalf of petitioner and respondents.

The evidence offered by the respondents, in addition to their response to the application for preliminary injunction and to the affidavits in support thereof, consists of the original brief filed by the Succession of Jacques E. Blevins in the Louisiana Supreme Court, to-

gether with the entire record filed in that Court under Docket No. 43,469.

While the matter was under advisement by the District Court on the application for a preliminary injunction, petitioner filed a motion to amend its complaint, by asking the Court to declare the judgment of the Louisiana Supreme Court in Suit No. 43,469 to be null and void and of no effect insofar as it declares that the respondents have any right, title or interest in the property described in the complaint. (Tr. 59-61.) An opposition to this motion to amend the complaint was filed by the respondents on the grounds that the Declaratory Judgment Statute (28 U. S. C. A. 2201, *et seq.*) does not enlarge the jurisdiction of the United States District Court but is purely procedural, affording an opportunity for a remedy only where the Court already has jurisdiction; that declaratory judgment proceedings are not available to determine whether rights theretofore adjudicated by a State Court have been properly adjudicated; that there was no actual controversy with respect to the meaning and effect of the judgment of the Louisiana Supreme Court in Docket No. 43,469; and that the injunction proceeding in the original complaint included all issues that might be raised under a declaratory judgment suit. (Tr. 59-63.) The District Court granted the motion of petitioner to amend its complaint, at which time it was stipulated that the earlier motion to dismiss filed by the respondents would apply to the complaint, as amended. (Tr. 63.)

On January 7, 1959, the District Court rendered a written opinion that the motion to dismiss was well founded and granted such motion. (Tr. 64-76.) A judg-

ment of dismissal was entered by the Court on January 12, 1959 (Tr. 77); and thereafter a motion for a new trial and rehearing was filed by petitioner on January 23, 1959.

The motion was denied and petitioner then prosecuted an appeal to the United States Circuit Court of Appeals for the Fifth Circuit. On June 29, 1959, a unanimous opinion and decree was rendered by that Court affirming the District Court. A petition for rehearing was filed by the petitioner, which was denied on July 28, 1959. The petitioner then filed this application for certiorari to this Court.

PETITIONER'S REMEDY WAS BY APPEAL AND/OR CERTIORARI TO THIS COURT FROM THE JUDGMENT OF THE LOUISIANA SUPREME COURT IN SUIT No. 43,469.

Petitioner, as well as the other forty-nine unsuccessful litigants in the State Court proceedings, did not elect to prosecute either an appeal from, or certiorari to, the Louisiana Supreme Court to review the final opinion and decree of that Court rendered on May 26, 1958. No such appeal was filed, nor was an application made for a writ of certiorari, and, consequently, after the lapse of ninety (90) days the judgment of the Louisiana Supreme Court became final and was not subject to review either by this Court, by a lower Federal Court, or by a State Court.

This principle has been clearly recognized by this Court in *Rooker v. Fidelity Trust Co.*, 263 U. S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923). In that case a bill of

equity was filed in the Federal Court to have a judgment of the State Court in Indiana, which had been affirmed by the Supreme Court of that State, declared null and void. An effort to have the judgment reviewed by this Court on a writ of error had failed because the record did not disclose the presence of any question constituting a basis for such a review. (See 261 U. S. 114, 43 S. Ct. 288.) The parties in the Federal Court action were the same as in the litigation in the State Court with the addition of two defendants. The petitioners claimed that the judgment rendered in the State Courts of Indiana was in contravention of the contract clause of the Constitution of the United States (Article 1, § 10, Cl. 1) and the due process of law and equal protection clauses of the Fourteenth Amendment in that it gave effect to a State statute alleged to be in conflict with those clauses and did not give effect to a prior decision in the same cause by the Indiana Supreme Court which is alleged to have become the law of the case. The United States District Court held that the suit was not within its jurisdiction and dismissed the bill. The petitioners then appealed directly to this Court and the decree of dismissal was affirmed. This Court pointed out that the suit was plainly not within the jurisdiction of the District Court as defined by Congress, and that the District Court's jurisdiction was one of original jurisdiction rather than appellate. This Court stated:

> "It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject-matter and the parties, that a full hearing was had therein, that the judgment was responsive to the

issues, and that it was affirmed by the Supreme Court of the state on an appeal by the plaintiffs. 131 N. E. 769. If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. Elliott v. Peirsol, 1 Pet. 328, 340, 7 L. Ed. 164; Thompson v. Tolmie, 2 Pet. 157, 169, 7 L. Ed. 381; Voorhees v. Bank of United States, 10 Pet. 449, 474, 9 L. Ed 490; Cornett v. Williams, 20 Wall. 226, 249; Ex parte Harding, 120 U. S. 782, 7 Sup. Ct. 780, 30 L. Ed. 824. **Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character.** Judicial Code, § 237, as amended by Act. Sept. 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214). **To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.** Judicial Code, § 24 (Comp. St. § 991). **Besides, the period within which a proceeding might be begun for the correction of errors such as are charged in the bill had expired before it was filed.** Act. Sept. 6, 1916, c. 448, § 6, 39 Stat. 726 (Comp. St. § 1228a), **and, as is point-**

ed out in Voorhees v. Bank of United States, supra, after that period elapses an aggrieved litigant cannot be permitted to do indirectly what he no longer can do directly." (Emphasis supplied.) (263 U. S. 415, 416, 44 Sup. Ct. 150.)

In *Angel v. Bullington*, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947), Bullington, a citizen of Virginia, sold land in Virginia to Angel, a citizen of North Carolina, under a deed of trust. Upon default, the land was sold and the proceeds applied to the note. Bullington then sued in the State Court of North Carolina for a deficiency claim. Angel claimed the action was barred by a North Carolina statute and upon appeal to the Supreme Court of North Carolina, the action was dismissed on the basis of that statute. **Bullington did not seek to review the State Court judgment by appeal or certiorari to this Court,** but instead sued Angel for the deficiency in the United States District Court in North Carolina. Bullington was awarded a judgment which was affirmed by the Circuit Court of Appeals for the Fourth Circuit and this Court then granted certiorari. This Court reversed the Circuit Court of Appeal and pointed out that litigation is needless if, by fair process, a controversy has gone through the courts to a conclusion. This Court further stated that litigation has terminated where issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties. *Chicot County Drainage District v. Baxter Bank*, 308 U. S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940).

The reasoning of this Court in *Angel v. Bullington, supra*, appears to be conclusive of the present issue, and

we quote the following pertinent portion of this Court's opinion:

> "Here, claims based on the United States Constitution were plainly and reasonably made in the North Carolina suit. The North Carolina Supreme Court met these claims. It met them by saying that the North Carolina statute did not deal with substantive matters but merely with matters regulating local procedure. But whether the claims are based on a federal right or are merely of local concern is itself a federal question on which this Court, and not the Supreme Court of North Carolina, has the last say. That Court could not put a federal claim aside, as though it were not in litigation, by the talismanic word 'jurisdiction'. **When an asserted federal right is denied, the sufficiency of the grounds of denial is for this Court to decide. Titus v. Wallick, 306 U. S. 282, 291, 59 S. Ct. 557, 562, 83 L. Ed. 653. Bullington could have come here, not merely by the grace of this Court on certiorari, but on appeal, as did White in White v. Hart, supra, to challenge, successfully, the right of Georgia to limit the jurisdiction of the George courts;** as did the East New York Savings Bank in the recent case of East New York Sav. Bank v. Hahn, 326 U. S. 230, 66 S. Ct. 69, 160 A. L. R. 1279, to challenge, though unsuccessfully, the limitation which New York placed upon the jurisdiction of its courts. Ci. Kenney v. Supreme Lodge, 252 U. S. 411, 416, 40 S. Ct. 371, 372, 64 L. Ed. 638, 10 A. L. R. 716. **Since it was open for Bullington to come here to seek reversal of the de-**

cision of the North Carolina Supreme Court shutting him out of the North Carolina courts and he chose not to do so, the decision of the North Carolina Supreme Court concluded an adjudication of a federal question even though it was not couched in those terms. For purposes of litigating the issues in controversy in the North Carolina action, the North Carolina Supreme Court was an intermediate tribunal. **If a litigant chooses not to continue to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him.** An adjudication of an issue implies that a man had a chance to win his case. The chance was necessarily afforded by the North Carolina litigation.

"It was in process of determination when the Supreme Court of North Carolina decided against him. He forewent his right to have a higher court, this Court, enable him to win his chance by holding that he was right and that the North Carolina Supreme Court was wrong. **He cannot begin all over again in an action involving the same issues before another forum in the same State.**" (Empasis supplied.) (330 U. S. 189, 190, 67 S. Ct. 660, 661.)

In *Brownell v. The Chase National Bank of the City of New York*, 325 U. S. 36, 77 S. Ct. 116, 1 L. Ed. 101 (1956), the United States Attorney General, as successor to the Alien Property Custodian, had intervened

in an action in the New York courts brought by the trustee for an interpretation of a trust indenture. The Attorney General sought relief that the powers reserved to the settlor, a German alien, be held to have passed by virtue of the vesting order to the Attorney General. This relief was denied by the New York Courts and the judgment was affirmed by the Court of last resort in New York, the Court of Appeals. **No review of that order was sought in the United States Supreme Court.** Subsequently, in another suit in New York the Attorney General requested that the principal of the trust be transferred to him. This relief was denied, and the judgment was affirmed upon appeal to the New York Court of Appeals. The Attorney General then brought certiorari to this Court, and the judgment was affirmed. We quote the pertinent portion of this Court's opinion, to-wit:

> "Under familiar principles of res judicata, the claim so tendered may not be relitigated. Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195. Tait v. Western Maryland R. Co., 289 U. S. 620, 623, 53 S. Ct. 706, 707, 77 L. Ed. 1405. **If he was not content with the first ruling, his remedy was by certiorari to this Court.** Angel v. Bullington, 330 U. S. 183, 189, 67 S. Ct. 657, 660, 91 L. Ed. 832. **Having failed to seek and obtain that review, he is barred from relitigating the issues tendered in the first suit."** (Emphasis supplied.) (352 U. S. 39, 40, 77 S. Ct. 117, 118.)

Actually, petitioner is seeking to have a lower Federal Court review the opinion and decree of the Louisiana State Supreme Court, after having failed to timely

seek the appellate and supervisory jurisdiction of this Court following the final action of the Louisiana Supreme Court. This review has been denied to petitioner by the United States District Court and by the Circuit Court of Appeals, and petitioner now requests this Court by certiorari to review such **final** judgment of the State Court. While petitioner contends that it is merely seeking in a diversity proceedings to have a judgment of the State Supreme Court declared null and void and enjoined, nevertheless, the present proceedings are tantamount to a review of and or appeal from the judgment of the Louisiana Supreme Court.

The failure of petitioner to have raised, in timely and proper fashion in the State Court proceedings, the federal questions now urged is in itself sufficient basis for the denial of the writ of certiorari. *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. 1090 (1942); *Lynch, et al., v. People of New York, ex rel. Pierson*, 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191 (1934); *McGarrity v. Delaware River Bridge Commission, et al.*, 292 U. S. 19, 54 S. Ct. 565, 78 L. Ed. 1095 (1934).

Petitioner attempts to exculpate itself by belatedly claiming in the Federal Court proceedings that the deprivation of its constitutional rights, and the denial of due process, only became apparent after the Louisiana Supreme Court had rendered its final opinion on rehearing on May 26, 1958.

Petitioner improperly argues that it did not have any notice of the violation of its alleged constitutional

rights after the State case was finally decided on rehearing without any reservation to it to apply for a second rehearing.

Assuming, but not admitting that the Louisiana Supreme Court actually violated one or more of petitioner's alleged constitutional rights, respondents would show that petitioner had full and complete knowledge thereof on November 12, 1957, when the original opinion and decree were rendered by the Louisiana Supreme Court. While this is denied by the petitioner on the one hand, it is admitted on the other hand on page 5 of petitioner's application when it says:

> "The three dissenting justices of the Louisiana Supreme Court took cognizance that the mandatory substantive and procedural law of the State of Louisiana had been violated and denied petitioner by the majority of the Court."

Reference to these dissenting opinions will clearly show that the three dissenters (Honorable McCaleb, Hamiter and Hawthorne, Justices) in what counsel has deemed to call vigorous dissents complained about the alleged failure of the majority opinion to require the plaintiff in the State suit to recover "on the strength of his own title and not on the weakness of that of his adversary." (See Appendix, page 52, for Mr. McCaleb's statement, page 55 for Mr. Hamiter's statement and page 57 for Mr. Hawthorne's statement.)

Because of petitioner's own failure to act, the application for the writ of certiorari should be denied for want of a timely presented federal question. *McGarrity v.*

Delaware River Bridge Commission, et al., supra; Wabash Railroad Co. v. City of Defiance, 167 U. S. 88, 17 S. Ct. 748, 42 L. Ed. 87 (1897); *Whitney v. California*, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927).

Furthermore, the Louisiana Supreme Court certainly had a right to be able to consider whether or not whatever judgment it had rendered might violate any of the constitutional rights of the petitioner. By not timely raising the present constitutional claims before the Louisiana Supreme Court, petitioner thereby deprived the Louisiana Supreme Court of its right to consider such claims.

Even if the claim of lack of due process could be properly considered at this time and through this procedure, such claim is so trivial as to be completely frivolous. See: *Consolidated Turnpike Co. v. Norfolk & Ocean-view Railway Co.*, 228 U. S. 596, 33 S. Ct. 605, 57 L. Ed. 982 (1913) wherein this Court pointed out that the bare claim that the judgment of a State Supreme Court operated to take the property of the plaintiff in error without compensation was not enough to justify this Court in taking jurisdiction.

Even if petitioner's present claims were not frivolous, the procedure under the circumstances of this case raises no substantial federal question. *Edleman v. People of State of California*, 344 U. S. 357, 73 S. Ct. 293, 97 L. Ed. 387 (1953); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

In *Edleman v. People of State of California, supra,* this Court recognized that it was without power to decide whether constitutional rights were violated where the federal questions were not seasonably raised in accordance with the requirements of state law. In that case, the petitioner was claiming that he had been deprived of notice and opportunity to have a hearing in the State Appellate Court.

In *Rice v. Sioux City Memorial Park Cemetery, Inc., supra,* the basis for the petitioner's resort to this Court was primarily the Fourteenth Amendment through the due process and equal protection clauses. This Court pointed out that it does not sit to satisfy a scholarly interest in such issues, nor does it sit for the benefit of particular litigants. See also *Magnum Import Co. v. Coty,* 262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922 (1923).

We submit, therefore, that, petitioner's failure to have raised its present constitutional claims in the State Court proceedings, as well as its failure to timely apply to this Court for an appeal from, or writ of certiorari directed to, the Louisiana Supreme Court is fatal to its present application for certiorari. Otherwise, litigation would be interminable if the parties are permitted to exhaust the appellate processes of the State Courts and then begin anew in the Federal District Courts.

IN A DIVERSITY ACTION THE FEDERAL COURTS ARE BOUND BY THE LAWS OF THE STATE.

In a recent decision, the Court of Appeals for the Fifth Circuit recognized that under the statutes and juris-

prudence of the State of Louisiana, the Louisiana State District Courts have no jurisdiction to annul a final judgment of the Louisiana State Supreme Court and that, consequently, the Federal District Court does not have jurisdiction to grant relief which is not authorized under the State law. *Dulien Steel Products, Inc., v. Connell*, 252 F. (2d) 556 (5th C. C. A. 1958), certiorari denied 356 U. S. 968, 78 S. Ct. 1008, 2 L. Ed. (2) 1074.

The Circuit Court of Appeals interpreted the law of Louisiana in this respect, which law is set forth in many decisions. For example: *Melancton's Heirs v. Broussard, et al.*, 2 La. 8 (1830); *Succession of Martin v. Succession of Hogyatt*, 37 La. Ann. 340 (1885); *Clark v. Delta Tank Manufacturing Co.*, 28 So. (2d) 62 (La. Appeal 1946); *Gajan v. Patout and Burguieres*, 135 La. 156, 65 So. 17 (1914).

Under accepted practice, this Court ordinarily accepts the interpretation of local law by the Courts of Appeal. *Ragan v. Merchants Transfer and Warehouse Company*, 337 U. S. 530, 69 S. Ct. 1233, 93 L. Ed. 1520 (1949); *Propper v. Clark*, 337 U. S. 472, 69 S. Ct. 1333, 93 L. Ed. 1480 (1949).

Since the decision in *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), it is settled that the laws of the State are controlling upon the Federal Courts. A Federal Court in a diversity action merely adjudicates a State-created right and it cannot grant relief if the right to recover is made unavailable by the State, nor can it substantially affect the enforcement of the right as given by the State. *Guar-*

anty Trust Company of New York v. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945). Since the cause of action is created by local law, its measure can only be found in local law. *Ragan v. Merchants Transfer and Warehouse Company, supra.*

Since the whole purpose of the Federal Court proceedings is an attack on the decree and opinion of the Louisiana Supreme Court and since under Louisiana law the District Courts can have no jurisdiction to annul such judgment, it necessarily follows that the doctrine in *Dulien Steel Products, Inc., v. Connell, supra,* must prevail.

28 U. S. C. 2283 PROHIBITS THE GRANTING OF AN INJUNCTION BY THE UNITED STATES DISTRICT COURT AGAINST THE ENFORCEMENT OF A FINAL DECREE OF THE LOUISIANA SUPREME COURT.

In 1948, Section 265 of the Judicial Code was amended, which revision is now contained in Title 28 U. S. C., Section 2283.

The federal jurisprudence subsequent to the 1948 amendment supports the proposition that jurisdiction of a Federal Court to enjoin State Court actions, other than those within the specific exceptions prescribed in Section 2283, may not be implied. See: *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, 348 U. S. 511, 75 S. Ct. 452, 99 L. Ed. 600 (1955); *International Union of Electrical Radio and Machine Workers, C.I.O., v. Underwood Corporation*, 219 F. (2d) 99 (2d C. C. A. 1954); *Sexton v. Barry*, 233 F. (2d) 220 (6th C. C. A. 1956).

In *Amalgamated Clothing Workers of America v. Richman Bros. Co., supra*, this Court recognized that Congress, by the amendment in 1948, made clear beyond cavil that the prohibition against the issuance of an injunction is not to be whittled away by judicial improvisation.

The Federal jurisprudence prior to 1948 which had recognized limited exceptions to this rule (where fraud or jurisdiction were involved) was reviewed by this Court in *Toucey v. New York Life Insurance Co.*, 314 U. S. 118, 62 S. Ct. 139, 86 L. Ed. 100 (1941), and it was stated that "the foundation of these cases is thus very doubtful."

The Third Circuit Court of Appeals held that it had no jurisdiction over a suit for a declaratory judgment coupled with an injunction, that a decree of the New Jersey Supreme Court was invalid as contravening the due process clause of the Constitution. *Nongard v. Burlington County Bridge Commission*, 229 F. (2d) 622 (3rd C. C. A. 1956). See also *International Union of Electrical Radio and Machine Workers, C.I.O., v. Underwood Corporation, supra; Sexton v. Barry*, 233 F. (2d) 220 (6th C. C. A. 1956) cert. den. 350 U. S. 838.

It has been held that this prohibition applies to final judgments of the State Court where the judgment-plaintiff is sought to be enjoined rather than the officers of the Court. *H. J. Heinz Co. v. Owens*, 189 F. (2d) 505 (C. C. A. 9th 1951). Moreover, this Court has recognized that the clause "Proceedings in a State Court" within the meaning of Section 2283 includes "any proceedings supplemental or ancillary taken with a view to making the suit or judgment effective". *Hill v. Martin*,

296 U. S. 393, 56 S. Ct. 278, 80 L. Ed. 293 (1935). Furthermore, the prohibition in Section 2283 cannot be avoided by framing the injunction as a restraint on the party litigant rather than directly against the State Court itself. *Oklahoma Packing Company v. Oklahoma Gas & Electric Company*, 309 U. S. 4, 60 S. Ct. 215, 84 L. Ed. 537 (1940). Nor can the coupling of a declaratory judgment claim with the injunction suit serve to circumvent this lack of jurisdiction. *Nongard v. Burlington County Bridge Commission, supra.*

The amendment of the complaint by petitioner to seek a declaratory judgment in addition to the injunction did not serve to vest the District Court with jurisdiction. The Declaratory Judgment Act (28 U. S. C. A. 2201 as amended, and 2202, and 28 U. S. C. A. Rule 57 of the Rules of Civil Procedure) does not enlarge the jurisdiction of the United States District Court, but is purely procedural giving an opportunity for remedy only where the court has jurisdiction. *Skelly Oil Company v. Phillips Co.*, 339 U. S. 667, 70 S. Ct. 876, 94 L. Ed. 1194 (1950); *Goldstein v. Johnson*, 184 F. (2d) 342 (D. C., C. C. A. 1950) certiorari denied 340 U. S. 879; *Cadillac Publishing Company, Inc., v. Summerfield*, 227 F. (2d) 29 (D. C., C. C. A. 1955) certiorari denied 350 U. S. 901; *Commercial Casualty Insurance Co. v. Fowles*, 154 F. (2d) 884 (C. C. A. 9th 1946); *Morgantown Glassware Guild, Inc., v. Humphrey*, 236 F. (2d) 670 (D. C., C. C. A. 1956).

It has been repeatedly held that the declaratory judgment procedure may not be used for the purpose of determining whether rights theretofore adjudicated have been properly adjudicated. *Rudolph Tuckson v. Donald*

Clemmer, 231 F. (2d) 658 (4th C. C. A. 1956); *Hurley v. Lindsay*, 207 F. (2d) 410 (4th C. C. A. 1953); *Clark, U. S. Attorney General, v. Memolo*, 174 F. (2d) 978, at 981 (D. C., C. C. A. 1949).

In *H. J. Heinz Co. v. Owens*, 189 F. (2d) 505 (9th C. C. A. 1951) writ denied 342 U. S. 905, the Circuit Court of Appeals pointed out that the wholesome purpose of the Declaratory Judgment Act would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum, and that the perversion of the purpose of such legislation occurs when it is used to anticipate the result of litigation pending in another forum or to re-examine what has been there decided.

The petitioner had a reasonable opportunity in the State Court proceedings to lay a proper foundation for an appeal or for writs to this Court. Petitioner's inaction and loss of rights as a result thereof cannot be substituted by a declaratory judgment proceeding. *Kaufman and Ruderman, Inc., v. Cohn and Rosenberger*, 177 F. (2d) 849 (2d C. C. A. 1949); *Hurley v. Lindsay*, 207 F. (2d) 410 (4th C. C. A. 1953). It has been recognized that the purpose of the declaratory judgment statute is to adjudicate rights of parties who have not been given an opportunity to have those rights determined and is not for the purpose of having a declaration of such rights as a different declaration thereof; no litigant is entitled to two declarations of the same rights. *McLain, et al., v. Lance, et al.*, 146 F. (2d) 341 (5th C. C. A. 1945), certiorari denied, 325 U. S. 855.

Since the United States District Court is prohibited from enjoining the enforcement of the final judgment of

a State Supreme Court, and since the Declaratory Judgment Act does not enlarge the jurisdiction of the Federal Courts, it follows that this action was properly dismissed.

Petitioner relies upon *County of Allegheny v. Frank Mashuda Company*, 79 S. Ct. 1060 (1959), which was a diversity action for ouster of lands, together with an injunction, against a state agency which had taken possession of lands under state expropriation proceedings. **The prayer for injunctive relief was abandoned in this Court.** However, this Court recognized that Section 2283 bars injunctions designed to stay state court proceedings. Further, this Court expressly found that the adjudication of the issues in the case would present no hazard of disrupting federal-state relations. Of course, this is not the situation in the present case where the Federal Courts, in reality, are being called upon to interpret state law in a manner contrary to the interpretation by the highest Court of the State.

A FEDERAL COURT CANNOT REVIEW A STATE COURT DECISION MERELY UPON THE ALLEGATIONS OF A VIOLATION OF DUE PROCESS OF LAW, WHERE THE STATE COURT HAD JURISDICTION OVER THE PARTIES, ISSUE WAS JOINED, AND THE MATTER RESULTED IN A FINAL JUDGMENT.

Petitioner has made various claims as to deprivation of constitutional rights under the Federal and State Constitutions. A reading of the State Court opinions (105 So. (2d) 392) discloses that the record does not support the conclusions, inferences and deductions which are drawn therefrom by petitioner.

The mere unsupported averment of petitioner as to deprivation of constitutional rights or denial of due process is not sufficient. See: *Consolidated Turnpike Co. v. Norfolk & Oceanview Railroad Co., supra; Edleman v. California, supra.*

Even if the decision of the Louisiana Supreme Court were erroneous, which is denied, the jurisprudence is uniform that an erroneous decision does not deprive the unsuccessful party of his property without due process of law within the meaning of the Fourteenth Amendment of the United States Constitution. *Bristow Battery Co. v. Board of Commissioners of Rogers County,* 37 F. (2d) 504 (10th C. C. A. 1930), certiorari denied, 282 U. S. 843, 51 S. Ct. 23, 75 L. Ed. 748; *Porter v. Bennison,* 180 F. (2d) 523 (10th C. C. A. 1950), certiorari denied 340 U. S. 817, 71 S. Ct. 47, 95 L. Ed. 600; *Sun Ray Oil Co. v. Commissioner of Internal Revenue,* 147 F. (2d) 962 (10th C. C. A. 1945), certiorari denied, 325 U. S. 861, 65 S. Ct. 1201, 89 L. Ed. 1982; *Lynch v. International Banking Corporation,* 31 F. (2d) 942 (9th C. C. A. 1929), certiorari denied, 280 U. S. 571, 50 S. Ct. 28, 74 L. Ed. 624; *Lake v. Central Savings Bank of Oakland,* 27 F. (2d) 847 (C. C. A. 9th 1928), certiorari denied, 275 U. S. 571, 48 S. Ct. 159, 72 L. Ed. 432; *Thomson v. Butler,* 136 F. (2d) 644 (8th C. C. A. 1943), certiorari denied, 320 U. S. 761, 64 S. Ct. 69, 88 L. Ed. 454; *Biggs v. Ward,* 212 F. (2d) 209 (7th C. C. A. 1954); *Given v. Moll,* 177 F. (2d) 765 (5th C. C. A. 1949), certiorari denied, 339 U. S. 964, 70 S. Ct. 999, 94 L. Ed. 1373; *United States v. Ragen,* 247 F. (2d) 638 (7th C. C. A. 1957), certiorari denied, 351 U. S. 957, 76 S. Ct. 858, 100 L. Ed. 1479.

The evidence of a substantial question of constitutionality must be shown in the allegations of the complaint. *Levering & Garrigues Co. v. Morrin, et al.*, 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1062 (1933). A litigant has no vested right in prior decisions of a State Court; even though the decision of the Supreme Court of a State may have been erroneous and even contrary to principles established by earlier decisions, such a decision on that cause alone does not constitute an infraction of due process and equal protection and, therefore, does not present any justiciable Federal question. *Smith v. Fourth National Bank of Tulsa*, 141 F. (2d) 294 (10th C. C. A. 1944).

In *Buchalter v. People of the State of New York*, 319 U. S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492 (1943), this Court recognized that the Fourteenth Amendment does not draw to itself the provisions of the State constitutions or the State laws; but that it leaves the States free to enforce their laws under such statutory provisions and common law doctrines as they deem appropriate and it (the Fourteenth Amendment) does not permit a party to bring to the test of a decision in the Federal Court every ruling made in the course of a trial in a State Court. An erroneous decision of a State Court does not deprive the unsuccessful party of his property without due process of law within the meaning of the Fourteenth Amendment of the Federal Constitution. *Central Land Co. v. Laidley*, 159 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91 (1895); *Patterson v. Colorado*, 205 U. S. 454, 27 S. Ct. 556, 51 L. Ed. 879 (1907).

In *Bonner v. Gorman*, 213 U. S. 86, 29 S. Ct. 483, 53 L. Ed. 709 (1909), this Court recognized that it has been firmly established in the jurisprudence that when parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a State Court does not deprive the unsuccessful party of his property without due process of law within the meaning of the Fourteenth Amendment of the Federal Constitution. Similarly, in *Worcester County Trust Co. v. Riley*, 302 U. S. 292, 58 S. Ct. 185, 82 L. Ed. 268 (1937) this Court unequivocally stated that the Constitution of the United States does not guarantee that the decisions of State Courts shall be free from error; or require that pronouncements shall be consistent.

The failure of a litigant in a State Court, even though there may have been error in the decision by the State Court, is not sufficient to constitute a substantial due process question. *Defiance Water Co. v. City of Defiance*, 191 U. S. 184, 24 S. Ct. 63, 48 L. Ed. 140 (1903); *O'Callaghan v. O'Brien*, 199 U. S. 89, 25 S. Ct. 727, 50 L. Ed. 101 (1905); *Wagner Electric Manufacturing Co. v. Lyndon*, 262 U. S. 226, 43 S. Ct. 589, 67 L. Ed. 961 (1923).

Pretermitting all other considerations, jurisdiction to review by certiorari should be granted only in cases of general importance, in cases affecting relations with foreign governments, or to secure uniformity of decisions, and, consequently, there is no basis for this Court to review the present case. *Forsyth v. City of Hammond, et al.*, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095 (1897);

Houston Oil Co. v. Goodrich, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385 (1918).

In *Forsyth v. City of Hammond*, *supra*, this Court stated:

> "It is conceded that the judgment of the supreme court of Indiana in this controversy could not be reviewed by this court on writ of error; that the questions involved and decided by that court are not of a federal nature, or such as to vest any appellate jurisdiction in this court. But, if this court cannot set aside such judgment on the ground of error of law, it would seem to follow that no subordinate federal court has the power on the same ground to strike it down. What the highest court of the United States cannot do directly would seem to be beyond the reach of a subordinate court in collateral attack." (17 S. Ct. 671.)

The present writ of certiorari does not present a substantial federal question and the record does not support any claim of deprivation of due process. A federal question or infringement of constitutional rights must have a substantial foundation and not depend solely upon unsupported averment. *Lynch, et al., State Tax Com'rs of New York, v. People of New York, ex rel. Pierson*, 293 U. S. 52, 55 S. Ct. 16 (1934); *Buck, et al., v. People of State of California*, 343 U. S. 99, 72 S. Ct. 502 (1952); *City of New Orleans, et al., v. New Orleans Water Works Co., et al.*, 142 U. S. 79, 12 S. Ct. 142 (1891).

The petitioner, in its petition for rehearing in the Circuit Court of Appeals, claimed for the first time that

it had been denied its day in the State Court proceedings because it had no opportunity to present its evidence concerning documents which it claimed had been excluded from the record because of petitioner's objections thereto.

Petitioner makes this same claim in this Court but does not refer to the record to support this bare averment. (Petition for Certiorari, pp. 3, 4, 6 and 10.) Petitioner in its application for rehearing in the Circuit Court of Appeals referred to one particular document (P-24) only and has cited in that brief what it considers to be the Court's ruling on pages 556 and 1715 of the State Court transcript.

Petitioner is in complete error as to such ruling, which error may be attributable to the fact that the present counsel for petitioner did not participate in the State Court trial. Such trial was over a period of many months and resulted in 1,892 pages of transcribed testimony and 350 exhibits. All of the earlier rulings of the trial court, including the ruling to which petitioner now makes reference, were recalled by the Court, with the exception of the ruling as to Exhibit P-2-A which formed no part of the chain of title of the Estate of Jacques E. Blevins, the plaintiff in the State Court proceedings.

It is less than being fair with the Court for petitioner to represent that evidence was considered by the Louisiana Supreme Court which had theretofore been excluded by the trial judge. A careful examination of the transcript will show that the evidence was actually not excluded. If it had been, it is difficult to explain why the three vigorous dissenting opinions would not have mentioned

such a fact. But even if petitioner were correct (and it is absolutely wrong), the Louisiana Supreme Court had a perfect right to examine all of the evidence that was in the record and the document about which petitioner complains was properly in the record. The Louisiana Supreme Court has a right at all times to reverse a trial court on a question of fact where in its opinion the trial court's ruling has been manifestly erroneous. Moreover, the action by the Louisiana Supreme Court was clear and unambiguous and petitioner was well aware of such action on November 12, 1957, when the original opinion and decree were entered. Petitioner did not claim in its application for rehearing that such action on the part of the Louisiana Supreme Court deprived petitioner of any of its constitutional rights!

The pertinent and controlling ruling is set forth in the State Court transcript at page 1745 wherein the trial judge, after stating that he would maintain the objections of the defendants as to Exhibit P-2-A, said:

"THE COURT (continuing):

"As to all other Exhibits which have been argued, I have decided to recall my ruling and now refer all objections, to all evidence to the merits, subject to the objections of the defendants and subject to any objections you may wish to make to the rulings. If this meets with your approval, I think we could facilitate matters when you make your objections and arguments, and refer them to the merits."

This ruling of the Court was accepted by counsel who then represented the present petitioner and we quote the remarks of such counsel:

> "We certainly would not want to say that ALL exhibits should be admitted subject to your ruling; but if that is Your Honor's ruling we take no exception to it, because we feel it is most important for you to have the Exhibits before you when you make your ruling on them."

It is patent, therefore, that all exhibits (with the exception of P-2-A) were offered and filed in evidence and that the objections made by the defendants in the State Court proceedings were referred to the merits. In civil cases in Louisiana, it is not necessary to reserve a bill of exceptions, or note in lieu thereof, to any ruling by a trial judge upon the admissibility or competency of any evidence tendered in a case. Louisiana Act 61 of 1908; Louisiana Revised Statutes 13:4448.

An examination of the documentary evidence filed in the State Court, and in particular P-24 referred to in petitioner's brief, readily discloses that such documents bear the inscription of the Clerk of Court as to filing.

In Louisiana, the Supreme Court decides a case on the issues and pleadings in evidence and not on the argument of counsel in the Court below or even on reasons assigned by the trial judge, and the fact that the trial judge decides the case on one of the points at issue does not preclude the Supreme Court from deciding the case on another point. *Board of Commissioners of Orleans Levee District v. Shushan*, 197 La. 598, 2 So. (2d) 35 (1941).

In *Richard v. Cain, et al.*, 168 La. 608, 122 So. 866 (1929), certain testimony was objected to and excluded by the trial court. The rejected evidence was then introduced for the purpose of permitting the Appellate Court to review such ruling but such procedure was objected to by the defendants. The Supreme Court of Louisiana pointed out that such evidence was before the Appellate Court and that it was therefore enabled to make a final disposition of the case on the appeal.

The record is clear that all of the documentary evidence, with the exception of Exhibit P-2-A, was filed and introduced in evidence in the trial court subject to the objections of the defendants, one of whom is the present petitioner, and that all objections were referred to the merits. Consequently, all of the documents, including Exhibit P-24, were before the Louisiana Supreme Court when it decided the issues of title in favor of the Estate of Jacques E. Blevins.

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and should be granted only where there are special and important reasons therefor. Rule 19, Supreme Court Rules; *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

The present controversy is not designed to resolve conflicts of opinion on federal questions that have arisen among the lower Courts, nor does it involve questions of wide import under the Federal Constitution. Neither are there any special and important reasons to justify the review of this case. Therefore, this Court, in the exercise

of its discretion, should deny the present application for writs of certiorari.

This controversy does not involve or affect class litigation but is merely a review of a State Court proceeding among private litigants involving local statutes and local laws. This Court should be called upon only to decide those questions whose resolution will have immediate importance far beyond the particular facts and parties involved.

In the present instance, the petitioner has failed or neglected to follow the proper procedure prescribed by Statute (28 U. S. C. 1257) in applying to this Court either for an appeal from, or certiorari directed to, the Louisiana Supreme Court, for the purpose of having this Court review the final judgment of the Louisiana Supreme Court. If any question of constitutional rights had been involved, as now belatedly claimed by petitioner, such question necessarily arose and was apparent when the Louisiana Supreme Court resolved the question of title in favor of Margaret E. Lauer, Testamentary Executrix, one of the respondents, in the original decree rendered on November 12, 1957. Certainly no new or different question of constitutional law or rights could or did arise since the Louisiana Supreme Court had already decided the title adversely to petitioner and this judgment was affirmed as to the tracts in the controversy on May 20, 1958. That judgment became final long before petitioner filed its original complaint in this case, and the Federal Court proceedings necessarily constitute an attempt at relitigating or reviewing the State Court's final decree and judgment.

Petitioner contends, however, that it has not called upon the United States District Court to review the final unappealable judgment of the Louisiana Supreme Court. This is tantamount to asking that the use of the judgment be restrained and enjoined without an examination of the evidence, oral and documentary, upon which the Louisiana Supreme Court based its own final decision. The argument urged by petitioner seems to recognize that a United States District Court may not under the established jurisprudence examine and evaluate the evidence in a State Court record. At the same time, petitioner proposes that the United States District Court set aside and render ineffective a final judgment of a State Supreme Court without even ascertaining whether or not such judgment is supported by a clear preponderance of the evidence and the weight of the State jurisprudence.

It is unthinkable that this Court would sanction the setting aside of a State Supreme Court's final decision without first determining that the decision is contrary to the law of the State's highest Court and the evidence. This is particularly true in a case where the State Court had jurisdiction, each party had a full day in Court, being represented by competent counsel, and no party having complained of the lack of a fair hearing or of the violation of constitutional rights and there is no claim of any irregularity whatsoever except that the final unappealable judgment of the State Supreme Court may be contrary to the laws of that State.

CONCLUSION.

For the many reasons stated above, petitioner's application for a certiorari herein should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, Kalford K. Miazza, a member of the Bar of the Supreme Court of the United States and one of the attorneys for the respondents herein, do hereby certify that on this day I made service of the brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, upon the petitioner, Manufacturers Record Publishing Company, through its attorneys of record, W. Scott Wilkinson, John M. Madison, and John C. Christian, Post Office Box 1707, 1708 Beck Building, Shreveport, Louisiana, by addressing three copies of the brief to each of the above counsel of record at his post office address as above indicated, and depositing same in the United States Post Office at New Orleans, Louisiana, with first-class postage prepaid (Shreveport, Louisiana, being less than five hundred (500) miles from New Orleans, Louisiana).

October , 1959.

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